TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 418

HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, MEMBERS OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, APPELLANTS,

vs.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON

FILED SEPTEMBER 30, 1936.

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IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

In Equity. No. E-4473

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, Copartners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company, Plaintiffs,

vs.

HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Members of the Tax Commission of the state of Washington, Defendants

BILL OF COMPLAINT—Filed June 5, 1936

For cause of action plaintiffs allege:

1. Plaintiff Silas Mason Company, Inc. is a corporation organized and existing under the laws of the state of Delaware, and is a citizen and resident of such state. Plaintiff Walsh Construction Company is a corporation organized and existing under the laws of the state of Iowa, and is a citizen and resident of such state. Plaintiff Atkinson-Kier Company is a copartnership consisting of Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, all of whom are citizens and residents of the state of California. Plaintiff Mason-Walsh-Atkinson-Kier Company is a corporation organized and existing under the laws of the state of Delaware, and is a citizen and resident of that state. The defendants Harold H. Henneford, Thomas S. Hedges and T. M. Jenner constitute the Tax Commission of the state of Washington, and in all things herein complained of against them they have assumed and are assuming to act as the Tax Commission of the state of Washington. The defendant Thomas S. Hedges is a resident of the eastern district of Washington. This suit is brought to prevent the sale of and to remove a cloud upon the title to personal property which is situated within that district.

[fol. 2] 2. The cause of action pleaded arises from the effort of the defendants to tax plaintiffs and their operations while engaged in the construction of a dam across the Columbia River for the United States. The antecedents and circumstances of the dam construction are as follows: Extending over a period of a good many years there has been continual agitation in the Pacific northwest for the improvement and development of the resources of the Columbia River and of the Snake River, its principal tributary, including the betterment of those streams for purposes of navigation, prevention of damage from floods along the lower reaches of the Columbia River, the generation of electrical power from their waters, and the irrigation of arid lands along their courses. The source of the Columbia River is in lakes in British Columbia, and these and the river itself are fed from mountain streams and lakes of the Rocky Mountains in both Canada and the United States. Above its lower reaches, the river partakes of the character of a mountain stream, its fall being great, its current swift, and its course marked at intervals by rapids flowing over and through rocky masses of such magnitude as to render navigation difficult and in many instances impossible save by the construction of canals and locks. The alternations in its flow are great, its period of high water depending for time and intensity upon the melting snow in the mountains where are its sources. Its principal tributary is the Snake River, whose waters are drawn from the Bitter Root and Rocky Mountains in Idaho and Montana. The Snake River has the same characteristics as the Columbia River. With improvements that have been made and are contemplated, the Columbia is commercially navigable from its mouth to the mouth of the Snake, and the Snake from its junction with the Columbia to a point a short distance above the confluence of the Snake and Clearwater. Above the mouth of the Snake, the Columbia is navigable locally, from pool to pool, as far as the mouth of the Okanogan River. All such navigation is difficult and is not commercially feasible under existing [fol. 3] conditions because of the alternations in the flow of the stream, its great fall and consequent swiftness of current, and the rapids and obstructing masses of rock which so frequently dot its course. The same character-

istics which impair or destroy the navigability of the Columbia, render it an ideal stream for the development of hydroelectric power. For the greater part of its length within the United States, the Columbia flows through an arid country, the land being immensely productive when placed under irrigation, but of no value without irrigation.

The agitation heretofore referred to bore fruit some years ago in an extended and detailed survey of the Columbia River and its principal tributaries by the Corps of Engineers of the War Department, and in 1932 the Chief of Engineers of the United States Army recommended a comprehensive plan for the improvement and development of the Columbia River within the United States. This recommendation took into consideration the improvement of the river and the use of its waters for the purposes of navigation, flood control, power development, and irrigation. It recommended the construction of ten dams across the river at various points within the state of Washington and where the river is the boundary between Washington and Oregon. The uppermost of these dams, and the one which was of a prime importance in the whole plan of development, was located at the head of Grand Coulee, Washington, a point wholly within the state of Washington, about 150 miles below the International boundary line and 274 miles above the mouth of the Snake River. The estimated cost of the entire improvement recommended by the engineers was between $700,000,000 and $800,000,000, of which the Grand Coulee Dam, completed for the production of power and irrigation purposes, would represent a cost of approximately $200,000,000. That dam would create a lake 150 miles long extending to the international boundary, afford irrigation facilities for 1,200,000 acres of irrigable land, admit of the production of electrical power at a lower cost than it would be produced at any other point in the United States, control the flow of flood waters and [fol. 4] give storage facilities for the smaller dams below it, and benefit the lower reaches of the river for purposes of navigation and flood control. Another dam recommended was one at Bonneville, which has since been constructed.

Of the Grand Coulee Dam and its circumstances, Mr. Frank A. Banks, Engineer in charge of the construction

for the United States of the Grand Coulee Dam, has written:

"Rising in the Canadian Rockies and crossing the international border into the state of Washington near the northeast corner thereof, the Columbia River, the second largest river in this country in point of runoff, then flows for 750 miles through this state and along its southern border to the Pacific Ocean, falling on its way 1300 feet and earning for itself the distinction of being by far the largest river in this country in point of potential power, susceptible of economic development.

"Adjacent to this river in Central Washington is a tract of 1,200,000 acres of what has been many times referred to as the finest body of undeveloped arid land in the West. Unproductive and of little value in its present state, this land when irrigated will produce a great variety of agricultural, horticultural, livestock, dairy and poultry products in abundance and provide homes, employment and business for a vast agrarian and urban population. The combination of these great resources—water, power and land—for the creation of the Columbia Basin Project has been the goal of the people of Washington for the past 30 years or more. • • •

"The comprehensive plan for the development of the Columbia River as worked out by the Army Engineers, contemplated the construction of 10 dams to utilize 92% of the available fall in the river between the International Boundary and the Pacific Ocean. By far the largest and most important of these is the Grand Coulee Dam—largest in that it utilizes 355 feet or 27% of the total available fall and includes an installation of 1,890,000 KW capacity, which is larger than any existing development in the world today and most important in that it creates a storage reservoir of over 5,000,000 acre feet of usable capacity at the highest possible point on the river in this country and affords the most feasible and practicable means of diverting the waters of the Columbia River out of its canyon and on to any considerable area of arid land."

The above statements are adopted by plaintiffs, and are alleged as facts for the purposes of the cause of action pleaded.

3. Following upon the recommendations of the Chief of Engineers, the Department of the Interior, Bureau of Reclamation, prepared specifications for the construction of a dam across the Columbia River, at the head of Grand [fol. 5] Coulee, Washington, the point designated in the recommendations of the Chief of Engineers as the most suitable place for the construction of the uppermost of the dams referred to in his report. Bids for the construction of the dam were called for, and plaintiffs (other than the Mason-Walsh-Atkinson-Kier Company) bid on the work and their bid was accepted. Upon, to wit, July 16, 1934, a contract was entered into between the United States of America, party of the one part, and the plaintiffs (other than the Mason-Walsh-Atkinson-Kier Company), parties of the other part, whereby the second parties agreed to furnish some of the materials and to perform work required for the construction of the naked dam and power plant in accordance with Items 1 to 85, inclusive, of the schedule of Specifications 570, Columbia Basin Project. Plaintiffs were to receive as consideration for performance of the work, and for such materials as were to be supplied by them, the total sum of $29,339,301.50. The contract permitted substantial changes to be made in the plans and specifications by the United States, and in addition to a number of minor changes a major change has been made in the plans for construction since the beginning of the work which has increased the amount of the agreed contract price by over $7,000,000. The construction of the dam was authorized, and the proceedings taken with respect thereto were ratified by the Rivers and Harbors Bill of the 74th Congress, whereby Congress, among other things, provided:

"That for the purpose of controlling floods, improving navigation, regulating the flow of the streams of the United States, providing for storage and for the delivery of the stored waters thereof, for the reclamation of public lands and Indiana reservations, and other beneficial uses, and for the generation of electric energy as a means of financially aiding and assisting such undertakings, the projects known as 'Parker Dam' on the Colorado River and 'Grand Coulee Dam' on the Columbia River, are hereby authorized and adopted, and all contracts and agreements which have been executed in connection therewith are hereby validated and

ratified, and the President, acting through such agents as he may designate, is hereby authorized to construct, operate, and maintain dams, structures, canals, and incidental works necessary to such projects, and in connection therewith to make and enter into any and all necessary contracts including contracts amendatory of or supplemental to those hereby validated and ratified."

[fol. 6] 4. Each of the plaintiff organizations is not only a nonresident of the state of Washington, but each has no other business and is engaged in no other operation in that state than the construction of the Grand Coulee Dam. Each organization (other than the Mason-Walsh-Atkinson-Kier Company) is engaged in independent business enterprises on its own account in widely separated parts of the United States. None of these business enterprises has any connection with or relation to the construction of the Grand Coulee Dam or to any other enterprise being conducted by any other plaintiff. Plaintiffs (other than the Mason-Walsh-Atkinson-Kier Company) entered into a joint contract for the construction of the Grand Coulee Dam, and for accounting and administrative purposes it was necessary to constitute a creature which should represent all of them in the prosecution of the work on that structure alone. To that end they caused the plaintiff Mason-Walsh-Atkinson-Kier Company to be organized as a corporation under the laws of the state of Delaware, directly or through their agents taking all the capital stock of that corporation and furnishing all its officers. Any assignment or other transfer of the contract with the United States was forbidden by Section 15, Title 41, U. S. C A. (R. S., Sec. 3737), and the plaintiffs who had contracted with the United States entered into an agreement with the plaintiff Mason-Walsh-Atkinson-Kier Company by which that Company was to act as their agent in the construction of the dam and the performance of all things required of them by their contract with the United States. From the beginning and at every step in its progress the work on the Grand Coulee Dam has been done by the contracting plaintiffs' agent and alter ego, the Mason-Walsh-Atkinson-Kier Company, and through the officers and agents whom they have placed in charge of it, the contract with the United States is being performed. They alone are responsible for the performance of the contract, they

have given bond in the sum of $5,000,000 for its performance, and they alone will profit or lose through its per-
[fol. 7] formance; the corporation Mason-Walsh-Atkinson-Kier Company being merely an entity brought into being by them for the more convenient doing of the work under the contract. In speaking hereafter of things done by plaintiffs in the performing of the contract or dealings in connection therewith, it is to be understood that the particular action was taken directly and in fact by the Mason-Walsh-Atkinson-Kier Company, but that its action was taken as the agent of the other plaintiffs; hence the allegation will be that it was done by the plaintiffs without distinguishing between them.

5. The construction work required of plaintiffs by their contract with the United States is one of unusual magnitude. It exceeds any work of similar character ever undertaken in the United States. Concerning this subject, Mr. Banks, the United States Engineer in charge of the construction, has said:

"The Grand Coulee Dam is often referred to as the 'key' structure in the comprehensive plan for the development of the Columbia River and one of the principal reasons for this lies in the fact that it creates a reservoir of over 5,000,000 acre feet of usable capacity, extending to the Canadian border, a distance of 150 miles, thereby adding a corresponding amount to the navigable inland waters of the state. Furthermore, the release of the stored waters from this reservoir during periods of low flow, not only increases the minimum, navigable channel depths by two (2) feet below Bonneville Dam and by 4.5 feet below Grand Coulee Dam with corresponding increases at intermediate points; but it also doubles the amount of firm power that can be developed at the six (6) power sites on the Columbia River between Grand Coulee Dam and the point where the Snake River joins the Columbia and increases by fifty (50%) per cent the firm power that can be generated at the various sites including Bonneville below this point. It becomes quite evident therefore why the Grand Coulee Dam is referred to as the key structure in the development of the comprehensive plan, and why its construction has been authorized as an initial step therein.

"* * * The dam will be 4,300 feet long, 550 feet high above the lowest bed rock and 500 feet thick at the base. It will have a spillway 1,650 feet long capable of handling a one million second foot flood. The volume of concrete required will be 11,000,000 cubic yards or two and one-half times that required for the Boulder Dam. The power installation sym-etrically placed on each side of the spillway will amount to 1,980,000 KW. of which 800,000 KW. will be for the generation of firm continuous power and the balance for secondary power for irrigation pumping and for standby service. Present contracts call for the completion of the foundation for the dam and power house to an average elevation about 50 feet above low water and involves among other things, the excavation of 15,000,000 cubic [fol. 8] yards of earth and rock and the placing of 3,500,000 cubic yards of concrete. The cost of this work including camp, railroad, highway, right of way, materials, etc., will be about $63,000,000. The cost of the completed structure is estimated at $186,000,000 and the irrigation features of the project $208,000,000, making a total of $394,000,000, but the maximum investment in the project is estimated at around $260,000,000, depending upon how rapidly the irrigation features are developed and how soon the power revenues may become sufficient to take care of the cost of future construction."

That statement is adopted by plaintiffs and is alleged as a fact for all the purposes of this action.

The dam is situated in a solid granite canyon created by the Columbia River, where the immense volume of the stream, flowing with almost irresistible force, especially during the high water period, and the physical conditions generally, require unusual methods and unusual implements of construction. In preparing for the work, plaintiffs adopted the policy of purchasing all machinery, materials and supplies required for the work in the state of Washington when the desired articles could be obtained in that state upon equal or relatively equal terms with which such articles could be obtained in other states. The character of the needed machinery and goods was such that a large part could only be obtained from manufactories in the industrial centers of the eastern part of the United States, or from branches on the Pacific Coast, these being generally established at San Francisco or Los Angeles, in

California, or Portland, in Oregon. Work on the dam was begun in 1934, and before its commencement, and frequently since that time, plaintiffs have been obliged to purchase machinery, materials and supplies in states other than Washington because the desired goods could not be obtained in that state, or could only be obtained on relatively unfavorable terms.

6. The Legislature of the state of Washington at the 1935 Legislative session enacted a general Revenue Act which contained many unique features, departing in substantially [fol. 9] all its features from previous provisions for raising revenue in that state, and in several from any theretofore known in the United States. This enactment is Chapter 180, Session Laws of Washington, 1935. By Title III of that Act it provided for a tax on retail sales within the state, and by Title IV for what is called a compensating tax, which is in effect a tax upon purchases made by persons within the state of Washington in other states of the Union. Reference to those titles is prayed for all the purposes of this complaint. Purporting to act under the authority of section 208 of the Revenue Act, the defendants, acting as the Tax Commission of Washington, have issued sundry rules and regulations relating to the various taxes provided by the Act and their collection. Respecting Title IV, such rules and regulations provide, among other things, as follows:

"Statement of the Nature of the Tax.—The Compensating Tax (Title IV) was enacted to supplement the Retail Sales Tax by imposing a like tax for privilege of using within this state tangible personal property purchased at retail subsequent to April 30, 1935 (the effective date of the Retail Sales Tax law) and in respect to which property neither a sales tax nor a use tax equal to 2% has been imposed by this or any other state.

"The primary purpose of the Compensating Tax is to protect the merchants of Washington from discrimination arising by reason of the inability of the state, because of the Federal Constitution, to impose a tax upon sales made to residents of this state by competitive merchants in other states.

"In general, the Compensating Tax applies upon the use of any property, the sale of which would have been

subject to the Washington sales tax had it been purchased within the state. Conversely, it does not apply upon the use of any property, the sale of which has been subjected to the Washington sales tax. Thus, these two methods of taxation stand as complements to each other in the state revenue plan, and taken together, provide a uniform tax upon either the sale or use of all tangible personal property, irrespective of where it may have been purchased."

"The Tax Does Not Apply in Respect of the Use of.—(1) Tangible personal property brought into the state by a non-resident for his use or enjoyment while temporarily within the state, unless such property is for use in conducting a non-transitory business activity within the state; * * *"

"Computation of Tax.—The tax imposed shall be levied [fol. 10] and collected in an amount equal to the purchase price paid by the taxpayer, multiplied by the rate of 2%. The term 'purchase price' means the consideration paid or given or contracted to be paid or given to the seller and, in addition thereto, the actual cost of transportation from the place where purchased to the person using the same in this state, but not exceeding the usual and ordinary cost of transportation of like property to a person dealing therein."

"A non-resident of the state of Washington is not subject to the Compensating Tax with respect to tangible personal property brought into the state of Washington for his personal use or enjoyment while temporarily within the state.

"This exemption does not extend to a non-resident engaged in business within the state who purchases tangible personal property for use or consumption in conducting such business.

"Where a non-resident purchases tangible personal property in a foreign state and later brings such property into the state of Washington, the Compensating Tax will apply unless the following conditions are conclusively established:

"(1) That the property when purchased was intended for bona fide use outside the state of Washington;

"(2) That the first actual use of the property was outside the state of Washington;

"(3) That the first actual use of the property outside the state was substantial and constituted the primary use for which the property was purchased.

"The burden of proof rests upon the purchaser, and until the above facts are established to the satisfaction of the Tax Commission it will be presumed that the use of such property is subject to the Compensating Tax."

7. Prior to the enactment of the aforesaid Revenue Act, plaintiffs had purchased in other states than Washington much heavy equipment and machinery generally which were necessary for the construction of the Grand Coulee Dam under plaintiffs' contract with the United States. The character of the work done requires frequent repairs and replacements of such equipment and machinery, and these repairs and replacements cannot be obtained within the state of Washington but must be purchased in other states. They make up a considerable item in the whole amount of goods purchased in other states by plaintiffs in the progress of the work. During the months of May and [fol. 11] June 1935 plaintiffs purchased within the United States outside the state of Washington locomotives, cars, compressors, conveyors, pumps, bridges, trestle steel, steel for general construction purposes, repair parts, replacement parts, and articles of the hundred and one different character which are required for the prosecution of a work of such magnitude as that upon which plaintiffs are engaged. The total amount of such purchases during the aforesaid two months was $899,390.91, and the transportation costs upon such purchases was $21,798.43. Substantially all such purchases consisted of articles which either could not be purchased at retail within the state of Washington, or were only purchasable there at a considerably higher price than that for which they could be purchased in other states in the Union. All the articles so purchased were purchased to be used, and were brought into the state of Washington and used, in and about and for the purposes of the construction of the Grand Coulee Dam under plaintiffs' aforesaid contract with the United States.

8. The defendants, purporting to act as the Tax Commission of the state of Washington, and proceeding in its name and under its authority, assert that plaintiffs are subject

to the payment on account of such purchases of the compensating tax which is provided for under Title IV aforesaid. Proceeding under such name and under the guise of such authority, the defendants have made the following written demand upon plaintiffs:

"Mason-Walsh-Atkinson-Kier Company, Mason City, Washington.

GENTLEMEN:

We have been advised that during the months of May and June, 1935, the Mason-Walsh-Atkinson-Kier Company purchased at retail and used within the state of Washington various and sundry articles of tangible personal property, the sale or use of which had not theretofore been subjected to the payment of any tax by the state of Washington or by any other state, the total purchase price of which amounted to $899,390.91, exclusive of transportation costs. We have also been advised that transportation [fol. 12] costs in connection with said purchases for said two months period amounted to $21,798.43.

We hereby make formal demand that you pay to the tax commission of the state of Washington on or before May 1, 1936, the sum of $18,423.78, the same being compensating tax at the rate of 2% due and payable to the state upon the amounts above set forth under the provisions of Title IV, chapter 180, Laws of 1935.

Demand is also hereby made upon you for payment on or before May 1, 1936, of a like tax upon all articles of tangible personal property purchased at retail between the dates July 1, 1935, and February 29, 1936, inclusive, and used by you in the state of Washington, the sale or use of which had not, prior to your purchase thereof, been subjected to a tax by this or any other state equal to 2% of the purchase price thereof.

You are advised that tax liability under Title IV, Chapter 180, Laws of 1935, arises at the time tangible personal property is put to use within the state of Washington. Such property is put to use by the first act after delivery is completed within the state by which the article purchased is actually used or is made available for use with intent actually to use the same within the state. The term 'made available for use' means and includes the exercise of any

right or power over tangible personal property preparatory to actual use within the state, such as keeping, storing, withdrawing from storage, moving, installing or performing any act by which dominion or control over the property is assumed by the purchaser.

In the event that the foregoing demand is not complied with on or before the date specified, we shall be compelled to take the proper steps for the recovery of the full amount of taxes due.

Very truly yours, Tax Commission of the State of Washington, by T. M. Jenner, Commissioner."

EWA:K.

Plaintiffs deny liability for the payment of the taxes therein specified, and defendants threaten to and will, unless restrained by order of this court, proceed under authority of section 35, Title IV, and section 202 of Title XVIII, both of the aforesaid Revenue Act, to cause the seizure and sale of the property purchased by plaintiffs without the state of Washington as hereinbefore alleged. The seizure and sale of such property would disrupt the complicated structure and plans under which the construction of the Grand Coulee Dam is progressing, would [fol. 13] render it impossible for plaintiffs to proceed with the execution of the contract, would do them irreparable injury, and would embarrass and greatly delay the prosecution and completion of the governmental work of the United States. Plaintiffs have no speedy and adequate remedy at law for the wrongs contempated and threatened by defendants, and their only recourse is to pay the unjust and void taxes demanded of them if they shall not procure a remedy in this court. Furthermore, the work upon which plaintiffs are engaged will be in progress for upwards of two years, and from time to time in its progress plaintiffs will be required, or desire, to purchase machinery and materials necessary in construction of the dam, outside the state of Washington, and unless it be held in this action that taxes accruing on account of such purchases under Title IV aforesaid are illegal and unenforcible, defendants will from time to time make demand upon plaintiffs for the payment of a tax on account of such purchases, and will seek to compel payment of such taxes by seizure and sale of any property so purchased.

9. Plaintiffs aver that the tax which defendants seek to collect from them as hereinbefore alleged is illegal and unenforcible against plaintiffs for the following reasons:

(a) The construction of the dam upon which plaintiffs are engaged under their contract with the United States is a governmental work of great magnitude, in the prosecution of which the executive department of the United States is exercising a franchise granted by the Congress to construct a dam across the Columbia River, a navigable stream, to the end that navigation may be improved, flood control effected, and the irrigation of public lands be made possible. In the exercise of this franchise and the prosecution of this governmental work plaintiffs are employed as agencies and instrumentalities of the United States. The machinery, materials and supplies purchased by plaintiffs without the state of Washington and used by them within [fol. 14] such state, on account of which the litigated tax is proposed to be collected, are used in, upon and about the construction of the aforesaid dam on behalf of the United States. Plaintiffs charge that the imposition of a tax for such use is in effect the imposition of a tax upon the use of the machinery, materials and supplies by the United States in the construction of a public work, and that under and by virtue of the fundamental principles on which the Union is constituted, the state of Washington is without power to levy a tax upon such use, and that the tax sought to be enjoined is illegal under the Constitution of the United States.

(b) Only a relatively small number of the states in the Union have provisions for a sale or use tax of the character indicated by subdivision (c) of section 32, Title IV of the Revenue Act aforesaid. Plaintiffs are informed and believe and upon such information and belief allege the fact to be that the following tabulation shows the states having such a tax, and the amount of the tax, towit: Arizona 2%; Arkansas 2%; California 2½% to 6-30-35; 3% thereafter; Colorado 2%; Connecticut has a gross receipts tax on incorporated businesses at the rate of $1 for each $1,000 or fraction thereof of the gross income of retail merchants; Delaware has a merchant's license tax at the rate of 1/10th of 1% of the aggregate contract value of merchandise purchased during the year; Idaho 2%; Illinois 2% to 6-30-35; 3% thereafter to 12-31-36; then 2% thereafter; Indiana 1% of retail sales to customers; Iowa 2%; Kentucky 3% on

gross receipts of sales by retail merchants; Maryland 1%; West Virginia gross income tax of ½ of 1% on retailers, and also a sales tax at 2%; Michigan 3%; Wyoming 2%; Mississippi 2%; Missouri ½ of 1% to 8-26-35; 1% thereafter; New Jersey 2% after 7-1-35; North Carolina 3%; North Dakota 2%; Ohio approximately 3%; Oklahoma 1%; Pennsylvania merchants' license tax on retailers at $2 plus $1 on each $1 of gross sales during preceding year; South Dakota 2%; Utah 2%. It will be observed that the greater number of the states in the eastern part of the United [fol. 15] States, where plaintiffs' principal purchases of heavy machinery, equipment, repairs and replacements, etc. are made, have no provision for such a tax.

The purpose of the provisions of Title IV aforesaid requiring the payment of a compensating tax is to impose such a burden upon persons purchasing personal property for use in the state of Washington in other states than Washington, as will prevent or discourage the purchase of personal property in other states and compel or induce purchases within the state of Washington of all personal property that is to be used in that state. It is, in effect, an impost upon goods purchased and shipped in from other states to be used in the state of Washington, and is illegal and void because it is a burden upon interstate commerce forbidden by section 8, clause (3) of Article I of the Constitution of the United States.

(c) The aforesaid Title IV is void in that it attempts to regulate commerce among the several states in violation of Article I, section 8, Clause (3), of the Constitution of the United States. Its enforcement would have the effect (1) to discourage persons residing or having occasion to be or go in the state of Washington from purchasing goods at retail outside that state which they desire to use or enjoy in it, (2) to extend the financial policy of that state and its method of raising revenue to other states by imposing a tax upon goods purchased in such states equivalent to that which would be imposed by that state, (3) to cause discrimination in purchases between states which have and those which have not a tax on retail sales similar to that of the state of Washington, and (4) by including cost of transportation as a part of the purchase price, to induce persons in the state of Washington who are obliged or desire to purchase goods outside of that state, to purchase in

states nearest it an penalty of paying a higher cost for transportation if they make their purchases in more remote states.

(d) Title IV abridges the privileges and immunities of [fol. 16] plaintiffs, who are citizens of the United States, in violation of the Fourteenth Amendment to the Constitution of the United States, in that it imposes a penalty upon them for purchasing goods in states where they may be obliged or may desire to obtain them, and by such penalty compels or induces them either to purchase in the state of Washington or in states nearest to that state.

(e) Title IV is also void in that it seeks to deny to plaintiffs the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, for that it imposes a penalty upon plaintiffs for goods purchased in states where they may be obliged or may desire to obtain them, and by such penalty compels or induces them either to purchase in the state of Washington or in states nearest to that state.

(f) Plaintiffs are citizens and residents of states other than Washington. They are within the state of Washington solely for the purpose of discharging their contract obligations with the United States. All machinery, materials and supplies purchased by them and used within the state of Washington were purchased and brought within the state and used there solely in the performance of plaintiffs' contract with the United States, and all such machinery, materials and supplies will be used and enjoyed by plaintiffs only while they are within the state of Washington and for the purposes of the contract aforesaid. A great part of the machinery purchased will be destroyed or rendered worthless by its use in the construction of the Grand Coulee Dam, and such as retains value will, upon the completion of the contract with the United States, be removed from the state of Washington and will cease to be used in that state; or, if any of such equipment and machinery should then be sold by plaintiffs prior to such removal, it will thereby and thereupon become subject to any retail sales tax of the state then in effect which may be levied upon sales of goods while within the state. By virtue of Clause (a), section 32, Title IV of the Revenue Act afore- [fol. 17] said, the tax which defendants are seeking to en-

force is not imposable upon purchases made by plaintiffs under the circumstances aforesaid.

(g) Because plaintiffs are only temporarily within the state of Washington and are there for the purpose of performing a contract with the United States, whereby the United States receives the benefit of a public franchise and is enabled to discharge a governmental duty, they are not taxable for the privilege of using goods wherever purchased in the discharge of their obligations to the United States.

(h) By chapter 18, Laws of Washington 1891 (Rem. Rev. Stat., Sec. 8108), the state of Washington consented to the acquisition by purchase or by condemnation by the United States of America of tracts, pieces and parcels of land within the boundaries of the state for the sites of locks, dams, piers, breakwaters, keepers' dwellings and other necessary structures and properties required in the improvements of the rivers of the state or bordering thereon, and ceded to the United States of America the jurisdiction of the state over all such land or lands as might be acquired by purchase or by condemnation or set apart by the general government for any of the purposes mentioned, such consent being given in accordance with the 17th clause of the 8th section of the first Article of the Constitution of the United States and with the Acts of Congress in such cases made and provided. The United States acted under such consent and cession in acquiring lands upon which are situated the Grand Coulee Dam and power plant whereon the work required of plaintiffs under their aforesaid contract with the United States is in progress. Such action and acquisition constituted a contract between the state of Washington and the United States by which the United States became possessed of exclusive jurisdiction for taxation purposes over the lands so acquired, and plaintiffs, by reason of their contractual relation to the United States and the necessity for discharging their contractual obligations upon the lands so acquired by the United States, are [fol. 18] entitled to the benefit of the contract.

Wherefore, plaintiffs pray an adjudication that as against them the provisions of Title IV, of chapter 180, Session Laws of Washington, 1935, are null and void; that the tax

of which defendants are claiming payment is illegal and unenforcible against plaintiffs; that such asserted tax be removed as a cloud upon the title to the personal property purchased by plaintiffs outside the state of Washington and used in the prosecution of the work described in the complaint, and that defendants be enjoined and perpetually restrained from enforcing or attempting to enforce the collection of such tax from plaintiffs or by the sale of their property. Plaintiffs further pray the issuance of an interlocutory injunction preventing defendants from proceeding to collect the tax as demanded by them, and that a court be constituted to hear plaintiffs' application for an interlocutory injunction at a time fixed by the court. Plaintiffs pray the issuance of a subpœna and such other and further relief as may be meet and equitable.

Graves, Kizer & Graves, Attorneys for Plaintiffs.
W. G. Graves, Solicitor.

Duly sworn to by T. J. Walsh. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed June 5, 1936

Plaintiffs apply for an interlocutory injunction in this cause restraining defendants from levying upon the personal property described in the complaint or otherwise enforcing the provisions of Title IV, Chapter 180, Session Laws of 1935 of the state of Washington, pending the trial of this cause.

This application will be heard upon plaintiffs' verified complaint and upon such affidavits as plaintiffs may serve and file herein in accordance with the order of the court in that behalf.

Dated at Spokane, Washington, June 5th, 1936.

Graves, Kizer & Graves, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—Filed June 5, 1936

Upon the presentation of the verified complaint in this cause,

It is Ordered that defendants, and each of them, appear in this court at Spokane, Washington, at 10 o'clock a. m., on the 19th day of June, 1936, before a statutory court as in such cases provided and show cause why plaintiffs' complaint for an interlocutory injunction restraining defendants from levying upon the personal property described in the complaint, or from otherwise enforcing Title IV, Chapter 180, Session Laws of 1935 of the state of Washington, pending trial of this cause, should not be granted.

It is Further Ordered that plaintiffs immediately serve each of the above named defendants by mail with a copy of the complaint and a copy of this order, and that defendants serve plaintiffs with a copy of such motions or pleadings as they may desire to present in this cause at least ten days prior to said June 19, 1936.

It is Further Ordered that plaintiffs' application for an interlocutory injunction be heard on their verified complaint and such affidavits, if any, as plaintiffs may desire to submit; that in the event plaintiffs desire to submit affidavits they shall serve copies thereof by mail upon the [fol. 21] defendants at least ten days prior to the date herein fixed for the hearing of the application for an interlocutory injunction. In the event that defendants desire to submit affidavits upon the hearing they shall serve copies thereof upon the attorneys for the plaintiffs at least three days prior to the date set for the hearing of the application for the interlocutory injunction.

Dated at Spokane, Washington, this 5th day of June, 1936.

J. Stanley Webster, Judge.

[File endorsement omitted.]

[fol. 22] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ASSEMBLING THREE-JUDGE COURT—Filed June 13, 1936

It appearing to the Court that the above entitled cause is one requiring the presence of a statutory court consisting of three judges, one at least of whom shall be a Justice of the Supreme Court or a Circuit Judge, as required by Title 28, Section 380 U. S. C.

Now, Therefore, in virtue of said statute I hereby call to my assistance to hear and determine the above entitled cause the Honorable Bert Emory Haney, United States Circuit Judge for the Ninth Circuit, and the Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, who together with the undersigned shall constitute the statutory court for the purpose of hearing and determining the above entitled cause.

Done this 13th day of June, 1936.

J. Stanley Webster, United States District Judge.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF COMPLAINT, ETC.—Filed June 5, 1936

To His Excellency Clarence D. Martin, Governor of the State of Washington, Honorable George W. Hamilton, Attorney General, and to Harold H. Henneford, Thomas S. Hedges, and T. M. Jenner, members of the Tax Commission of the state of Washington:

You will please take notice that the above named plaintiffs have filed their complaint in the office of the clerk of the United State. District Court for the Eastern District of Washington, Northern Division, on the 19th day of June, 1936, a copy whereof is herewith served upon you, and that the District Court has issued an order to show

cause why the defendants above named should not be enjoined from enforcing the provisions of Title IV, Chapter 180 of the Session Laws of 1935 of the state of Washington, pending the trial of this cause on the merits, a copy of such order is also served upon you herewith.

You are further notified that the plaintiffs' application for an interlocutory injunction has been set down for hearing before a statutory court of three judges in the city of Spokane, Washington, at 10 o'clock a. m., on the 19th day of June, 1936, as appears from the copy of said order to show cause, which is also served upon you herewith.

[fol. 24] Dated at Spokane, Washington, this 5th day of June, 1936.

Graves, Kizer & Graves, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed June 18, 1936

Come now the defendants and move the court for an order dismissing the above entitled action upon the ground that the bill of complaint fails to state a cause of action against the defendants, or any or either of them, or entitle the plaintiffs, or any or either of them, to any relief whatsoever.

G. W. Hamilton, Attorney General of the state of Washington. R. G. Sharpe, Assistant Attorney General of the State of Washington, Attorneys for Defendants.

Copy received this 18 day of June, 1936.

Graves, Kizer & Graves, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 26] In United States District Court

[Title omitted]

Minute Entry of Hearing—June 19, 1936

The above entitled matter came on for hearing before Judges Haney, Cavanah and Webster as a statutory three judge Court on Defendant's motion to dismiss the action, and also on Plaintiff's application for an interlocutory injunction, Mr. W. G. Graves appearing for the plaintiffs, and Mr. R. G. Sharpe appearing for the defendants.

After the argument of counsel the motion to dismiss and application for interlocutory injunction taken under advisement, each counsel allowed 10 days to file a brief in answer to other counsel's trial brief.

* * * * * * *

Thereupon Court adjourned until Saturday, June 20, 1936.

J. Stanley Webster, District Judge.

[fol. 27] In United States District Court for the Eastern District of Washington, Northern Division

No. E 4473.

Silas Mason Company, Inc., Walsh Construction Company, Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, Co-partners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company, Plaintiffs,

vs.

Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Members of the Tax Commission of the State of Washington, Defendants

July 14, 1936

Messrs. Graves, Kizer & Graves, Spokane, Washington, Attorneys for the Plaintiffs.

G. W. Hamilton, Attorney General, State of Washington; R. G. Sharpe, Assistant Attorney General, State of Wash-

ington, both of Olympia, Washington, Attorneys for the defendants.

Before Haney, Circuit Judge, Webster and Cavanah, District Judges, as a Statutory Three-Judge Court

OPINION—Filed August 3, 1936

CAVANAH, District Judge:

The United States, under an act of Congress, is engaged in the construction of the Grand Coulee Dam, on the Columbia River, for the purpose of controlling floods, improving navigation, providing for the storage and delivery of stored water for the reclamation of public land, and generation of electrical energy. After receiving bids for the construction of the dam, which is one of unusual magnitude, a contract was, on July 16, 1934, entered into by [fol. 28] the United States and the plaintiffs (other than the Mason-Walsh-Atkinson-Kier Company) whereby plaintiffs named, agreed to furnish some of the materials and to perform work required for the construction of the naked dam and power plant in accordance with specifications of the Columbia Basin Project. Consideration of the contract was that plaintiffs were to receive $29,339,301.50 for the performance of the work and such materials as were to be supplied by them, and such additional amount caused by changes to be made in the plans and specifications by the United States, which has increased the amount of the agreed contract price by over $7,000,000.00.

The plaintiffs are non-residents of the state of Washington, and have no other business and are not engaged in other operations in that state, than the construction of the dam, and are within the state solely for the purpose of discharging their contract obligations with the United States.

The defendants constitute the tax commission of the state of Washington and as such are demanding payment of and endeavoring to collect the tax which is the subject of the controversy.

The legislature of the state of Washington, at the 1935 Session of the Legislature enacted a general revenue act, Chapter 180, Session Laws of Washington, 1935. By Title 3 of that Act it provided for a tax on retail sales within

the state of Washington, and by Title 4, for what is called a compensating tax, which is, in effect, a tax upon purchases of materials made by persons within the state of Washington, and in other states of the Union.

Claiming to act under authority of the act, the Tax Commission has adopted a number of rules and regulations relating to the various taxes provided by the act, and respecting Title 4, the Tax Commission has by rule provided that the nature of the tax is a compensating tax and so enacted to supplement the retail sales tax, by imposing a like tax for the privilege of using within the state tangible personal [fol. 29] property purchased at retail, subsequent to April 30, 1935, and with respect to which property, neither the sales tax nor the use tax of 2% has been imposed by the state of Washington or any other state, and the rules further provide that "the primary purpose of the compensating tax is to protect the merchants of Washington from discrimination arising by reason of the inability of the state, because of the federal constitution, to impose a tax upon sales made to residents of this state by competitive merchants in other states", Rule 178, page 104.

Having then in mind the facts appearing in the complaint and affidavits presented and the provisions of the act, we find that prior to the enactment of the act, plaintiffs had purchased in other states than Washington, heavy equipment and machinery which were necessary for the construction of the dam under their contract. After considering the character of the work done, the frequent repairs and replacement of machinery required, which cannot be obtained within the state of Washington, but must be purchased in other states, during the months of May and June 1935, plaintiffs purchased within the United States and outside of the state of Washington, equipment and machinery and other articles used in the construction of the dam, the purchase price of which was $899,390.91 plus transportation cost $21,798.43.

In the light of the facts, the requirements of the act and the regulations of the commission, plaintiffs, by their complaint and affidavits assert that as against them, the provisions of Title 4, chapter 180 of the laws of Washington are illegal and unenforcible and that such tax be removed as a cloud upon the title of their personal property purchased by them outside of the state of Washington and that de-

fendants be enjoined and perpetually restrained from enforcing and attempting to enforce the collection of such tax from them or by the sale of their property.

The reasons urged by plaintiffs as to the illegality of the tax as against them are:

[fol. 30] First: That the construction of the dam upon which plaintiffs are engaged under their contract with the United States is a governmental work in the prosecution of which the executive department of the United States is exercising a franchise granted by Congress to construct a dam across the Columbia River, a navigable stream, to the end that navigation may be improved, and irrigation of public lands and flood control be effected and that as the United States is in the exercise of the franchise and the prosecution of the Governmental work the plaintiffs are employed as agencies and instrumentalities of the United States, and their property is exempt from the imposition of the tax.

We think that under the record before us this contention is not well founded, when we are confronted with the facts that the plaintiffs are nothing more than independent contractors performing work and furnishing materials for a definite price which the government has agreed to pay and they have agreed to accept under the contract obtained by competitive bids. Their relations to the government are contractual, they do not exercise governmental functions, as they only undertook to construct the dam according to plans and specifications, adopted by the government, for a profit to be made in so complying. In no way is the government affected by the fact that they pay or do not pay taxes or that they are a government instrumentality. The cases relied upon by plaintiffs are not applicable to the facts here for we find that most of them are based upon facts where the parties claiming exemption were either agents of the government or engaged as employees or officers of the government in the exercise of governmental functions. The authorities seem to agree that independent contractors with the government for gain cannot claim immunity from taxation by reason of furnishing material or labor to the United States. Susquehanna Power Company v. State Tax Commission of Maryland, 283 U. S. 291; Broad River Power Co., v. Query et al., 288 U. S. 178; Trinityfarm [fol. 31] Construction Co., v. Grosjean, Supervisor of Public

Accounts of Louisiana, 291 U. S. 466; Six Cos., Inc., v. DeVinney, County Assessor, 2 Fed. Supp. 693; Nevada-California Power Co., v. Ullom et al., 3 Fed. Supp. 935; Ranier National Bank v. Henneford, 182 Wash. 159-163; General Construction Co. v. Fisher, 149 Ore. 84; 39 Pac. (2d) 358-361. Citations of similar import might be multiplied many times but those cited are enough to demonstrate beyond peradventure that under the record plaintiffs are not so situated as to urge that they are an agency or instrumentality of the United States exercising governmental functions in order to bring them under the rule of exemption of taxes.

Second: We come then to the real question in the case as to the constitutionality of the tax as against the plaintiffs. It is urged that the tax is levied against articles purchased outside of the state of Washington by plaintiffs because in the light of its history and present setting it is a deliberate attempt to tax articles purchased and brought in from another state, which is discriminating in its incidence against the articles because of their origin in another state. The Commerce Clause of the federal constitution is invoked as it is asserted that the act attempts to regulate commerce between states, the power of which is in Congress. The provisions of the act in question, which are pertinent to our inquiry are section 31; "There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state any article of tangible personal property purchased subsequent to April 30, 1935. Such tax shall be levied and collected in an amount equal to the purchase price paid by the taxpayer multiplied by the rate of 2%." Section 33; "If any article of tangible personal property has already been subjected to a tax by this or any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the [fol. 32] previous tax upon the sale or use was computed." Section 35 (a); "The term 'purchase price' shall mean the consideration paid or given or contracted to be paid or given by any person to the seller of an article of tangible personal property for the article purchased. The term shall include, in addition to the consideration paid or given

or contracted to be paid or given, the actual cost of transportation from the place where the article was purchased to the person using the same in this state."

The terms of the act are that the tax is levied and collected on any article of tangible personal property in an amount equal to the purchase price paid by the taxpayer multiplied by the rate of 2%, whether the article is purchased within or without the state of Washington, and is termed a compensating tax. It levies an excise tax for the privilege of using within the state, any article of personal property purchased subsequent to April 30, 1935. It is obvious from the act and the provisions of the exceptions to its operations that it was intended to discriminate against articles brought in from other states in order to remove any competition with the merchants of the state of Washington. This appears by sections 32 (c); 33 and 35 (a) of the act, and in its practical operation when applied to those states other than the state of Washington who have, and those who do not have a sales tax. It is apparent that the discrimination appears, as the complaint discloses that twenty-three states of the Union have a sales tax and as an illustration of the practical operation of the Washington tax we find that Idaho has a 2% sales tax, Oregon has no sales or use tax. One purchasing property in Oregon cannot bring it into Washington unless he pays a 2% tax on the purchase price, plus transportation costs, while one who purchases property in Idaho destined to be used in Washington may bring the property into Washington and put it to use without paying the tax. A further [fol. 33] illustration is; that the state of Illinois has a tax like Washington while Indiana has a tax of 1%, therefore, articles purchased in Illinois may be brought into and used in Washington tax free, while the same articles purchased in Indiana must pay a tax of 1%, the difference between the tax of the two states, plus the cost of transportation from Indiana to Washington. The discrimination more forcibly appears where the defendants under section 35 (a) have added $21,798.43 to the purchase price of the articles as transportation costs in other states which are subject to tax under the Washington act. Under the language of the act and the interpretation given to it by the Washington Tax Commission, both the legislature and the commission had primarily in mind removing from the shoulders

of the merchants of Washington competitive disadvantage occasioned by the Washington sales tax and the absence of such a tax in other states. This thought is borne out, as far as the commission is concerned, who is intrusted with the enforcement of the law, where they have said in regulation 178: "Statement of the nature of the tax.—The Compensating tax (Title IV) was enacted to supplement the retail sales tax by imposing a like tax for privilege of using within this state tangible personal property purchased at retail subsequent to April 30, 1935 (the effective date of the retail sales tax law) and in respect to which property neither a sales tax nor a use tax equal to 2% has been imposed by this or any other state."

"The primary purpose of the compensating tax is to protect the merchants of Washington from discrimination arising by reason of the inability of the state, because of the federal constitution, to impose a tax upon sales made to residents of this state by competitive merchants in other states."

When the validity of a state statute is challenged on the ground that it is repugnant to the Commerce Clause we are not bound by the legislative declaration of purposes because if the statute in its practical operation directly [fol. 34] burdens or destroys interstate commerce, the act must fall. We must look to the practical consideration of the established course of business in determining what is interstate commerce; Shafer v. Farmers Grain Co., 268 U. S. 189; Foster Packing Company v. Hoydel 278 U. S. 1-10; Baldwin v. Seelig, Supra. The courts are only concerned "with its practical operation, not its definition or the precise form of descriptive words which may be applied to it"; Lawrence et al., v. State Tax Commission of Mississippi 286 U. S. 276. If it bears upon commerce among the states as to amount to a regulation in a relatively immediate way, it cannot be upheld by name or form.

If the nature and effect of the tax levied by the act discriminates against articles purchased and brought in from other states and because of their origin in another state it is an attempt to regulate and a burden upon interstate commerce and would be inconsistent with the freedom of trade which Congress only has the power to regulate as between the states. It would seem unnecessary to cite

authorities in support of this well known construction of the commerce clause of the constitution, but see Hart Refineries v. Harmon, 278 U. S. 499, Baldwin v. Seelig 294 U. S. 511. With these principles in mind and applying them to the record it is apparent that the tax is discriminating in its incidence against articles because of their origin in other states and that the Washington act was framed for the purpose of suppressing competition from without the state. Plaintiff had a right to go into other states without first obtaining the leave of the state of Washing for all legitimate purposes of commerce and the litigated statute which lays a burden on the exercise of that privilege is void as against the plaintiff under the commerce clause. Dahnke Walker Milling Company v. Bondurant 257 U. S. 282; Lemke, as Attorney General of the state of North Dakota et al. v. Farmers Grain Co., 258 U. S. 50; Asher et al. v. Engels 13 Fed. Supp. 655.

The argument is pressed that the state may lawfully tax the "use" of tangible personal property brought in from [fol. 35] other states without a violation of the commerce clause and the defendants rely principally upon the decision of the Supreme Court of the state of Washington where this tax was sustained by a majority opinion as against the contention that it offends the commerce clause, Vancouver Oil Co. v. Henneford, 183 Wash. 317, 49 Pac. (2d) 14. In that decision the state Supreme Court seemed to have based its decision upon the sole thought that the goods affected had come to rest within the state of Washington and not as we view it, whether the tax was discriminating in its incidence against the goods because of their origin in another state. If it is levied without regard to origin and the goods had come to rest in the state of Washington, it would be neither a regulation nor a burden of interstate commerce, but that is not the case under this act and the record before us, for as has been said, it appears clear that the act was intended to levy a tax on articles purchased outside of the state of Washington, because of their origin, and by so doing it discriminates against such articles.

Tested by these considerations we have reached the conclusions that the litigated act is violative of the commerce clause of the federal constitution as against the plaintiffs and that the motion to dismiss is overruled, and that an

interlocutory injunction issue as prayed for in the complaint.

[File endorsement omitted.]

[fol. 36] IN UNITED STATES DISTRICT COURT

No. E. 4473

SILAS MASON COMPANY, INC., et al.

v.

HENNEFORD et al.

DISSENTING OPINION—Filed August 3, 1936

HANEY, Circuit Judge, Dissenting:

The tax in question is imposed on "the privilege of using" in Washington, articles of personal property, and is a "use tax." The validity of such taxes is not questioned except insofar as it may be said to conflict with the commerce clause of the federal constitution.

I cannot agree that the tax here laid, discriminates against commodities because of their origin in another state. The statute (Ch. 180, Sec. 31, Laws of Washington, 1935), levies the tax on the use of "any article of tangible personal property," and makes no distinction between articles, either because of the place of their origin or place of purchase. It is applicable to articles originating or purchased within the state of Washington as well as to those originating or purchased elsewhere.

The following section (Sec. 32 (c)), exempts from taxation "the use of any article of tangible personal property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title whether under the laws of this state or of some other state of the United States." Section 33 provides:

"If any article of tangible personal property has already been subjected to a tax by this or any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at

a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed."

The effect of these two latter sections together with Sec. 31 is to tax the use of all personal property, the sale or use of which has not already been taxed by any state, including Washington, to the extent of two percent of its purchase price. I see no discrimination in such a tax. As pointed out by defendants the articles exempt under the Washington sales tax law (See Sec. 19 Ch. 180 Laws 1935), even originating in Washington are subject to the use tax, See Sec. 32, supra.

[fol. 37] As to the universal applicability of the "use" tax, we might fairly consider the result had the Governor of Washington vetoed the sales tax (Title III, Ch. 180, Laws of 1935). Under such circumstances it seems to me conclusive that the "use" tax provided for in Sec. 31, supra, would have applied to the use of all tangible personal property, irrespective of its place of origin.

Plaintiffs make no contention that the tax, as applied to them is a tax on an instrumentality of interstate commerce, but contend that the tax is imposed directly upon interstate commerce, because in effect the tax is one on the goods themselves.

I am unable to agree with that argument, because the tax is on the "use" of the articles, not on the articles themselves. If the tax was one on the "use" of the articles while in interstate commerce, it might then be invalid, but there is no pleading nor proof in this case which authorizes such a conclusion. In fact, under the pleadings, it is shown that the articles were in interstate commerce until they reached their destination, at which point, the articles were intended to be used in constructing the dam. When that destination was reached, the character of the goods as "interstate commerce" ended. Bacon v. Illinois, 227 U. S. 504. By reason of the presumption that a statute is valid, we must presume that the tax attached to the use of the goods after their movement in interstate commerce had ended.

I therefore believe the bill should be dismissed.

[File endorsement omitted.]

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION AS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed August 7, 1936

Plaintiffs state that the opinion of the court fully complies with Equity Rule No. 70½, save and except that it fails and omits to include a significant paragraph from the demand served upon these plaintiffs by defendants set forth in paragraph eight of the complaint.

Therefore plaintiffs request an order be made making the opinion a part of the record in this case, and that it be adopted as the findings of fact and conclusions of law required by said rule when supplemented by the following further findings of fact and conclusions of law:

* * * * * * *

Clerk's Note

Herein are set forth supplemental findings numbers I to IV inclusive and supplemental conclusions of law numbers I and II in the same words and figures set forth in the findings of fact and conclusions of law.

Filed herein on September 16, 1936.

A. A. LaFramboise, Clerk.

* * * * * * *

[fol. 39] Dated this 7th day of August, 1936.

Graves, Kizer — Graves, Attorneys for Plaintiffs.

Copy received this 7th day of August, 1936.

G. W. Hamilton & R. G. Sharpe, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed September 16, 1936

Upon considering the motion of plaintiffs with respect to the making and drawing of findings of fact and conclusions of law, and being sufficiently advised,

It is Ordered that the opinion of this court filed in this cause be and the same hereby is made a part of the record and is hereby adopted as findings of fact and conclusions of law under Equity Rule No. 70½ supplemented by the following further findings of fact and conclusions of law:

Supplemental Finding No. I

"Prior to the commencement of this complaint the defendants as the Tax Commission of the state of Washington have made the following written demand upon plaintiffs:

'Mason-Walsh-Atkinson-Kier Company, Mason City, Washington.

GENTLEMEN:

We have been advised that during the months of May and June, 1935, the Mason-Walsh-Atkinson-Kier Company purchased at retail and used within the state of Washington various and sundry articles of tangible personal property, the sale or use of which had not theretofore be- subjected to the payment of any tax by the state of Washington or by any other state, the total purchase price of which [fol. 41] amounted to $899,390.91, exclusive of transportation costs. We have also been advised that transportation costs in connection with said purchases for said two months period amounted to $21,798.43.

We hereby make formal demand that you pay to the tax commission of the state of Washington on or before May 1, 1936, the sum of $18,423.78, the same being compensating tax at the rate of 2% due and payable to the state upon the amounts above set forth under the provisions of Title IV, Chapter 180, Laws of 1935.

Demand is also hereby made upon you for payment on or before May 1, 1936, of a like tax upon all articles or tangible personal property purchased at retail between the dates July 1, 1935, and February 29, 1936, inclusive, and used by you in the state of Washington, the sale or use of which had not, prior to your purchase thereof, been subjected to a tax by this or any other state equal to 2% of the purchase price thereof.

You are advised that tax liability under Title IV, chapter 180, Laws of 1935, arises at the time tangible personal property is put to use within the state of Washington. Such property is put to use by the first act after delivery is completed within the state by which the article purchased is actually used or is made available for use with intent actually to use the same within the state. The term 'made available for use' means and includes the exercise of any right or power over tangible personal property preparatory to actual use within the state, such as keeping, storing, withdrawing from storage, moving, installing or performing any act by which dominion or control over the property is assumed by the purchaser.

In the event that the foregoing demand is not compiled with on or before the date specified, we shall be compelled to take the proper steps for the recovery of the full amount of taxes due.

Very truly yours, Tax Commission of the State of Washington, By T. M. Jenner, Commissioner."

EWA:K.

Supplemental Finding No. II

Under the authority of Section 208 of Chapter 180, Session Laws of Washington 1935, the defendants, acting as the Tax Commission of the state of Washington, have on October 16, 1935, issued sundry rules and regulations relating to the various taxes provided by the act and their collection. Respecting Title IV such rules and regulations [fol. 42] provide among other things as follows:

"Statement of the Nature of the Tax.—The Compensating Tax (Title IV) was enacted to supplement the Retail Sales Tax by imposing a like tax for privilege of using within this state tangible personal property purchased at retail subsequent to April 30, 1935 (the effective date of the Retail Sales Tax law) and in respect to which property

neither a sales tax nor a use tax equal to 2% has been imposed by this or any other state.

"The primary purpose of the Compensating Tax is to protect the merchants of Washington from discrimination arising by reason of the inability of the state, because of the Federal Constitution, to impose a tax upon sales made to residents of this state by competitive merchants in other states.

"In general, the Compensating Tax applies upon the use of any property, the sale of which would have been subject to the Washington sales tax had it been purchased within the state. Conversely, it does not apply upon the use of any property, the sale of which has been subjected to the Washington sales tax. Thus, these two methods of taxation stand as complements to each other in the state revenue plan, and taken together, provide a uniform tax upon either the sale or use of all tangible personal property, irrespective of where it may have been purchased."

Supplemental Finding No. III.

At the hearing on plaintiffs' application for an interlocutory injunction, plaintiffs introduced no evidence in support of the contention made by them in paragraph nine, subdivision "h" of the complaint, wherein it is alleged that the said compensating tax provided for in Title IV of the said 1935 act is not collectible from plaintiffs by reason of the alleged ownership by the United States of the land whereon said dam is being constructed, and at said hearing the attorney for plaintiffs stated in open court that plaintiffs made no claim that said plaintiffs were entitled to an interlocutory injunction in the above cause by reason of the alleged facts set forth in said paragraph nine, subdivision "h", but that plaintiffs would submit evidence in support of such contention at the final hearing of said cause in support of their prayer for a permanent injunction, but not otherwise.

Supplemental Finding No. IV.

Plaintiffs have not paid any part of said purported tax and deny liability therefor. The seizure and sale of the [fol. 43] property for the use of which defendants threaten to collect said tax would disrupt the complicated structure and plans under which the construction of said dam is

progressing and would render it impossible for plaintiffs to proceed with the execution of said contract, would do plaintiffs irreparable injury and would embarrass and greatly delay the prosecution and completion of said contract. Unless the collection of said tax is enjoined, plaintiffs' only recourse is to pay said tax as demanded. In that event plaintiffs' only recourse under the laws of the state of Washington will be to bring suit in the superior court of the state of Washington for Thurston county for the recovery thereof. Plaintiffs will be engaged in the progress of said work for upwards of two years, and from time to time in its progress will be required to purchase machinery and materials necessary in the construction of said dam, outside Washington.

Supplemental Conclusion No. I

This court has jurisdiction of this cause by reason of diversity of citizenship, and because of the denial of the rights secured to plaintiffs by the Constitution of the United States.

Supplemental Conclusion No. II

The equity jurisdiction of this court in said cause is necessary because plaintiffs have no plain, speedy or adequate remedy at law.

Let decree enter in accordance with the foregoing.

Dated this 16th day of Sept., 1936.

——— ———, Circuit Judge. Charles C. Cavanah, District Judge. J. Stanley Webster, District Judge.

Copy received this 7th day of August, 1936.

G. W. Hamilton and R. G. Sharpe, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 44] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed September 21, 1936

Come now the defendants and except to the Findings of Fact and Conclusions of Law made and entered on Plaintiffs' application for an interlocutory injunction, as follows:

(1) Defendants except to that portion of said findings and conclusions wherein the court finds and concludes that Title IV, Chapter 180, Laws of Washington of 1935, and the tax imposed thereby, as measured by the purchase price and transportation costs of tangible personal property purchased by plaintiffs outside of Washington and transported into and used by plaintiff in Washington, constitutes an unlawful burden on interstate commerce and is therefore violative of the commerce clause of the federal constitution, for the reason that the same is contrary to the law.

(2) Defendants except to that portion of said findings and conclusions wherein the court finds and concludes that the tax imposed by Title IV, Chapter 180, Laws of Washington of 1935, is, in effect, a tax upon purchases of materials made by persons within the state of Washington, and in other states of the Union, for the reason that the same is supported neither by law nor by the facts revealed by the evidence herein.

[fol. 45] Defendants except to that portion of said findings and conclusions wherein the court finds and concludes that the tax imposed by Title IV, Chapter 180, Laws of Washington of 1935, was intended to and does discriminate against articles brought into the State of Washington from other states in order to remove any competition with the merchants of the state of Washington, for the reason that the same is supported neither by law nor by the facts revealed by the evidence herein.

(4) Defendants except to that portion of said findings and conclusions wherein the court finds and concludes that

the tax imposed by Title IV, Chapter 180, Laws of Washington of 1935, is violative of the commerce clause of the federal constitution in that such tax is discriminating in its incidence against articles because of their origin in states other than Washington, and that said statute was framed for the purpose of suppressing competition from without the state of Washington, for the reason that the same is supported neither by law nor by the facts revealed by the evidence herein.

Dated this 21st day of September, 1936.

G. W. Hamilton and R. G. Sharpe, Attorneys for Defendants.

Order Allowing Exceptions

The findings of fact, conclusions of law, and order granting interlocutory injunction having been made and filed herein in the absence of counsel for defendants and without prior notice to counsel for either party of the date of such filing, and the foregoing exceptions to the findings and conclusions of the court having been submitted to the court, said exceptions and each of them are hereby allowed.

Done in open court this 21st day of September, 1936.

J. Stanley Webster, Judge.

Copy received this 21st day of September, 1936.

Graves, Kizer & Graves, Attys. for Plffs. W. G. Graves, Solicitor for Plffs.

[fol. 46] In United States District Court

[Title omitted]

Order for Interlocutory Injunction—Filed September 16, 1936

This cause has come on regularly to be heard upon the motion of plaintiffs for an interlocutory injunction, and the court having duly considered the pleadings, affidavits and stipulations of the respective parties and arguments of counsel, and having made and drawn findings of fact and conclusions of law

It is Ordered that as against the plaintiffs, the provisions of Title IV, chapter 180, Section Laws of 1935, are

null and void; that the tax under the authority of Title IV of which the defendants are claiming payment is illegal and unenforceable as against plaintiffs; and that defendants, Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, and each of them, both individually and as the Tax Commission of the state of Washington be enjoined and restrained, during the pendency of this action and until further order of this court, from enforcing or attempting to enforce the collection of such tax from the plaintiffs or by the sale of their property.

It is Further Ordered that plaintiffs file a bond in the sum of Twenty-five Thousand Dollars ($25,000) duly con-
[fol. 47] ditioned as required by law.

Dated this 16th day of September, 1936.

——— ———, Circuit Judge. Charles C. Cavanah, District Judge. J. Stanley Webster, District Judge.

Copy received this 7th day of August, 1936.

G. W. Hamilton & R. G. Sharpe, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 48] [File endorsement omitted]

In United States District Court

[Title omitted]

PETITION FOR APPEAL—Filed September 21, 1936

To the Honorable, J. Stanley Webster, Judge of the United States District Court for the Eastern District of Washington, Northern Division:

Your petitioners, Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, members of the Tax Commission of the State of Washington, defendants in the above-entitled cause, respectfully represent and show that in said cause pending in the United States District Court in and for the Eastern District of Washington, Northern Division, there was entered on the 16th day of September, 1936, an order granting plaintiffs' application for an interlocu-

tory injunction, as prayed for in its complaint in said suit, which application was heard by three judges, in accordance with the provisions of section 266 of the Judicial Code, and which order is greatly to the prejudice and injury of your petitioners, and is erroneous and inequitable:

Wherefore, in order that your petitioners may obtain relief in the premises and for opportunity to show the [fol. 49] errors complained of, your petitioners pray that they may be allowed an appeal in said cause to the Supreme Court of the United States, agreeably to the statutes and rules of the court in such case made and provided, and that proper orders touching the security required of them be made.

Dated September 21st, 1936.

G. W. Hamilton and R. G. Sharpe, Attorneys for Defendants.

Order Allowing Appeal.

Appeal allowed upon giving bond as required by law for the sum of five hundred ($500.00) dollars.

J. Stanley Webster, District Judge.

Due and timely service of the foregoing Petition and Order by receipt of a true copy thereof acknowledged this 21st day of September, 1936.

Graves, Kizer & Graves, Attorneys for Plaintiffs.
W. G. Graves, Solicitor for Plaintiffs.

[fol. 50] [File endorsement omitted]

In United States District Court

[Title omitted]

Assignment of Errors and Prayer for Reversal—Filed September 21, 1936

Statement

Title IV, Chapter 180, Laws of Washington of 1935, imposed upon every person in the state of Washington a tax or excise for the privilege of using within said state any article of tangible personal property purchased subse-

quent to April 30, 1935, equal to 2% of the purchase price thereof plus costs of transportation to place of use, with an off-set of any use or sales tax paid thereon either in the state of Washington or any other state. On September 16th, 1936, an order was entered in the above cause adjudging that the provisions of said state are null and void and the tax imposed thereby is illegal and unenforceable as against plaintiffs, and granting an interlocutory injunction restraining the defendants, both individually and as the Tax Commission of the state of Washington, during the pendency of said suit from enforcing or attempting to enforce the collection of said tax from the plaintiffs or by the sale of their property.

[fol. 51] Assignments of Errors.

I

The court erred in granting said order for an interlocutory injunction herein for the following reasons:

The court granted said order upon the sole but erroneous ground that Title IV, Chapter 180, Laws of Washington of 1935, and the tax thereby imposed, as measured by the purchase price and transportation costs of tangible personal property purchased by plaintiffs outside of Washington and transported into and used by plaintiffs in Washington, constitutes an unlawful burden on interstate commerce and is therefore violative of the commerce clause of the federal constitution.

II

The court erred in finding and concluding that the tax imposed by Title IV, Chapter 180, Laws of Washington of 1935, is, in effect, a tax upon purchases of materials made by persons within the state of Washington, and in other states of the Union.

III

The court erred in finding and concluding that the tax imposed by Title IV, Chapter 180, Laws of Washington of 1935, was intended to and does discriminate against articles brought into the state of Washington from other states in order to remove any competition with the merchants of the state of Washington.

IV

The court erred in finding and concluding that the tax imposed by Title Iv, Chapter 180, Laws of Washington of 1935, is violative of the commerce clause of the federal constitution in that the tax is discriminating in its incidence against articles because of their origin in other states than Washington and that said statute was framed for the purpose of suppressing competition from without the state of Washington.

[fol. 52] Prayer for Reversal

Wherefore defendants pray that the said order for an interlocutory injunction may be reversed, and for such other and further relief as to the court may seem just and proper.

Dated this 21st day of September, 1936.

G. W. Hamilton and R. G. Sharpe, Attorneys for Defendants.

Due and timely service of the foregoing Assignment of Errors and Prayer for Reversal by receipt of a true copy thereof acknowledged this 21st day of September, 1936.

Graves, Kizer and Graves, Attorneys for Plaintiffs.
W. G. Graves and B. K. Kizer, Solicitor for Plaintiffs.

[fols. 53 & 54] Bond on Appeal for $500.00, approved and filed September 21, 1936, omitted in printing.

[fols. 55-63] Citation, in usual form, showing service on Graves & Kizer, filed September 21, 1936, omitted in printing.

[fol. 64] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Statement of Evidence under Equity Rule 75—Filed September 21, 1936

Be It Remembered: That the application of the plaintiffs for an interlocutory injunction restraining defendants from levying upon the personal property described in the complaint or otherwise enforcing the provisions of Title IV, Chapter 180, Session Laws of Washington of 1935, pending the trial of the above cause, and the order to show cause entered June 5th, 1936, pursuant to said application, came on regularly for hearing on the 19th day of June, 1936, at the hour of 10:00 a. m. before the Honorable Bert Emory Haney, Circuit Judge, the Honorable Stanley J. Webster, District Judge, and the Honorable Charles Cavanah, District Judge, theretofore duly and regularly assembled by the above entitled court, sitting in equity, for the purpose of hearing said application as provided by Section 266 of the Judicial Code as amended, W. G. Graves, Esquire, appearing as counsel for plaintiffs, and R. G. Sharpe, Esquire, appearing as counsel for defendants.

[fol. 65] PLAINTIFFS' EVIDENCE

Upon said application and order to show cause being called for hearing, plaintiffs introduced in evidence the affidavits of J. B. Canning, Arnold Hanger, Thomas J. Walsh, Jr., George H. Atkinson, and William E. Kier, which was the only evidence introduced by plaintiffs in support of such application for interlocutory injunction. The said affidavits so introduced by plaintiffs were in the following words and figures, to-wit:

[fol. 66] AFFIDAVIT OF J. B. CANNING

STATE OF WASHINGTON,
County of Okanogan, ss:

J. B. Canning, being first duly sworn, on his oath says: My domicile is, and for some years has been, at Fairmount,

West Virginia, which I expect to continue to make my permanent home. Ever since the commencement of the construction of the Grand Coulee Dam, in November, 1934, I have been temporarily residing at Mason City, Washington, and during that period have been employed by the Mason-Walsh-Atkinson-Kier Company, one of the plaintiffs above named, as its purchasing agent in charge of the purchase of equipment and supplies to be used in the performance of that certain contract entered into on the 16th day of July, 1934, between the United States of America, of the one part, and Silas Mason Company, Inc., a corporation, Walsh Construction Company, a corporation, and Atkinson-Kier Company, a co-partnership, parties of the other part. As such purchasing agent I supervised the making of purchases by Mason-Walsh-Atkinson-Kier Company during the months of May and June 1935 and am therefore advised concerning the nature and character of the purchases scheduled on the list of such purchases hereto annexed and hereby by me made a part of this affidavit.

This list so annexed lists only a part of the equipment and supplies purchased by Mason-Walsh-Atkinson-Kier Company during such period, it being restricted to the purchases made by Mason-Walsh-Atkinson-Kier Company of vendors at points located outside the state of Washington. As to such interstate shipments, it is to the best of my knowledge and believe complete.

The contract above described covers the construction of a large part of what is known as the "High Dam" across the Columbia River at Grand Coulee, Washington, which it is said will be the largest structure, when completed, ever erected by man. Accordingly, it uses machinery and equipment for the performance of this contract on an unprecedented scale. Much of the principal equipment used in the [fol. 67] performance of the contract, including the larger and more expensive equipment, has had to be constructed by manufacturers pursuant to special specifications prepared at the instance of Mason-Walsh-Atkinson-Kier Company in order to be large enough for the magnitude of the work, and such equipment could only be obtained of manufacturers located in the industrial region of the United States east of the Mississippi River.

My instructions from my employer were, from the first, to purchase all of the equipment and supplies that it was

reasonably feasible to purchase within the state of Washington and I sought wherever I could to follow out those instructions. Much the major portion of the equipment and supplies required by Mason-Walsh-Atkinson-Kier Company are not even carried in stock by any business concern within the state of Washington. After a careful scrutiny of the exhibit attached to this, my affidavit, I am able to say that, to the best of my knowledge and belief, none of the purchases listed on the annexed exhibit were carried in stock and available for purchase by us within the state of Washington except only in the instances in this affidavit hereinafter set forth, and that none of the items, so far as I am advised or able to learn, so purchased by us were manufactured in the state of Washington.

Furthermore, a contracting firm such as Mason-Walsh-Atkinson-Kier Company, on a contract of this magnitude, must purchase its supplies in such large quantities and of such unusual sizes that it is obliged to buy practically all of its supplies listed on the annexed exhibit, apart from the equipment hereinabove described, of the manufacturer or of the manufacturer's larger selling agencies located in great centers of use where such goods are most marketed. Generally speaking, retailers and wholesalers in the state of Washington make no attempt to carry any stock or sell supplies of the character such as are listed on the annexed exhibit. Thus, the Mason-Walsh-Atkinson-Kier Company has been obliged to purchase these supplies either of the [fol. 68] manufacturer or of their agencies located in regions outside the state of Washington where such supplies are carried in such quantity and with such completeness as are available to supply the immediate needs of Mason-Walsh-Atkinson-Kier Company.

Such a contract as the one here in question carries an enormous overhead of expense. Its performance must proceed with the utmost expedition and without any delay for the arrival of supplies, in order that the contract may be performed without excessive losses. In every case the element of time is controlling and compels the making of purchases in centers where they can be placed with assurance that the materials and supplies can be immediately furnished and shipped.

The remainder of this affidavit will concern itself with the few exceptions to the general rule above stated that it

was impossible to buy these supplies so listed within the state of Washington, or with purchases used to illustrate our difficulties in seeking to purchase supplies of this character within this state.

With respect to voucher No. 3091G, "Rectox," referred to, purchased of the Westinghouse Electric and Manufacturing Company, it could have been purchased through a local agency in Seattle which in turn, however, did not carry it in stock and would have had to order it of the Westinghouse Electric and Manufacturing Company in East Pittsburg for it. Because of our very large purchases, we could be assured of quicker attention to our order if we wired direct, than if we allowed it to pass through a local dealer's hands. We were in a great hurry for it and accordingly wired direct to the manufacturer for it and thus made a substantial saving of time in so doing.

With respect to voucher No. 3101, covering steel purchased of the Columbia Steel Company at San Francisco, the Columbia Steel Company is a subsidiary of the United States Steel Corporation and carries a stock sufficiently complete for our purposes only in San Francisco. A little of the steel might perhaps have been purchased at Seattle or [fol. 69] at Portland. Here again haste was needed and we saved considerable time by buying it in the one place where a complete stock was carried rather than seek to find how much we could buy of it in Portland and Seattle and then buying the rest in San Francisco.

A typical order that reveals our difficulties in getting supplies which we used in enormous quantities is illustrated by vouchers 3119 and 3381. The Ingersoll-Rand Company, who must furnish these supplies, have headquarters at Butte, Montana, and their salesman at Butte covers this state. We purchased a miscellaneous assortment of supplies of Ingersoll-Rand Company at that time and the order was filled by them from the several different agencies that they have, indicated in the enclosed list, because no one of them had all that we required.

A like illustration is furnished by vouchers Nos. 3215 and 3388 to the Marshall-Wells Company. It has stores and headquarters at various places; some of the orders not shown in this list were filled in Spokane out of its stock there but the rest of the orders had to be filled and were billed to us from Portland, Oregon, from Chicago, from

Pittsburg, from Greensburg, Pennsylvania, and from St. Louis, Missouri, in order to fill the order completely. Although one voucher number was issued in each case, the orders were independently filled by various agencies and were independently billed to us.

In a number of cases the orders were placed with Washington concerns who advised that they did not have the supplies and therefore turned the orders over to concerns outside the state in order to have them filled. A typical case of this character is voucher 3394, supplies ordered of the Seattle Hardware Company at Seattle but the order turned over to a Portland house and shipped and billed to us.

Similarly voucher No. 3495 issued to Hughes & Company at Spokane, Washington, for plumbing and heating supplies. They shipped us such as they could and then turned the rest of the order over to concerns at Kewanee, Illinois, [fol. 70] New York City, Oakland, California and Pennsylvania in order to fill completely and these goods were sent to us and billed to us from these locations.

With respect to voucher No. 3,000 on the first page of the exhibit, the ton of steel listed as the last item, could probably have been bought in this state but only at a premium price, due to the small quantity handled here, and steel ordered was therefore placed with the other forms of steel not so carried in order to have the order come complete and save the difference between the premium price and the normal market price for it when purchased in such quantities as we used.

Similarly, in voucher No. 3163, on page 3 of the exhibit, we could probably have purchased the tubes, or at least a part of them, in the state of Washington but only at a premium price. Consequently, we placed the order with the other supplies which could not be purchased in the state from the Woodbury Company at Portland, who represent the northwest distributors for this material and could furnish it at a price appropriate to a business purchasing such very large quantities as we used and who could also furnish the other materials that we ordered with the tubes.

(Subscribed and sworn to.)

[fol. 71]

EXHIBIT TO AFFIDAVIT

Purchases Made by Mason-Walsh-Atkinson-Kier Company Outside the State of Washington During the Months of May & June, 1935

Voucher No.	Vendor's Name	Quantity	Description	Cost	Origin of Shipment
2936	Howard-Cooper Corporation		Hammer Parts	458.00	Portland, Ore.
2938	Ingersoll-Rand Co.		Pump Parts	478.90	Phillipsburg, N. J.
2938	Ingersoll-Rand Co.		Drill Parts	341.00	Butte, Mont.
2945	Line Material Co.	400	Bolts & Braces	43.30	Milwaukee, Wis.
2948	Marion Steam Shovel Co.		Shovel Parts	82.70	Marion, O.
2950	Photostat Corporation		Paper & Developer	109.80	Rochester, N. Y.
2971	Bucyrus-Erie Co.		Shovel Pts.	43.90	Portland, Ore.
2971	Bucyrus-Erie Co.		Shovel Parts	2.05	Milwaukee, Wis.
2971	Bucyrus-Erie Co.		Shovel Parts	362.05	Milwaukee, Wis.
2971	Bucyrus-Erie Co.		Shovel Parts	223.60	Milwaukee, Wis.
2975	Columbia Steel Co.	4,320#	Steel	122.90	Portland, Ore.
2975	Columbia Steel Co.	23,950#	Steel	683.45	Portland, Ore.
2876	Coeur d'Alene Hwe & Fdry Co.	50'	Ven tube	29.00	Wallace, Idaho
2880	Fowler Mfg. Co.	1	Water Heater Assembly	24.00	Portland, Ore.
2887	J. A. Roebling's Sons Co.	5,000'	Steel Rope	403.41	San Francisco, Cal.
2887	J. A. Roebling's Sons Co.	50¼#	Wire	15.74	San Francisco, Cal.
2903	Bright Star Battery Co.	960	Fl. Cells	43.20	Clifton, N. J.
2920	Woodbury Co.		Drill Parts	35.43	Portland, Ore.
2978	Electric Steel Fdry Co.		Repair Parts—		Portland, Ore.
			Shovels	101.00	Portland, Ore.
2978	Electric Steel Fdry Co.		"	252.50	Portland, Ore.
2978	Electric Steel Fdry Co.		"	127.50	Portland, Ore.
2978	Electric Steel Fdry Co.		"	127.80	Portland, Ore.
2978	Electric Steel Fdry Co.		"	106.00	Portland, Ore.

2978	Electric Steel Fdry Co.		"	318.40	Portland, Ore.
2978	Electric Steel Fdry Co.		"	12.00	Portland, Ore.
2980	Garlock Packing Co.		Packing	22.65	Palmyra, N. Y.

[fol. 72]

2986	Graybar Elec. Company	16	Heaters	8.64	Portland, Ore.
3000	Pac. Mach. & Tool Steel Co.	716#	Rd. Cold Fin. Steel	47.26	Portland, Ore.
3000	Pac. Mach. & Tool Steel Co.	1,565#	Chrome Vanadium	170.59	Portland, Ore.
3000	Pac. Mach. & Tool Steel Co.	1,302#	Rd. Cold Fin. Steel	85.93	Portland, Ore.
3000	Pac. Mach. & Tool Steel Co.	654#	Chrome Nickel Steel	48.72	Portland, Ore.
3000	Pac. Mach. & Tool Steel Co.	2,006#	Steel	163.17	Portland, Ore.
3025	E. D. Bullard Company	24	Safety Belts	84.00	San Fran., Cal.
3030	Ingersoll-Rand Co.		Drill Parts	492.66	Butte, Mont.
3030	Ingersoll-Rand Co.		Drill Parts	11.00	Athens, Pa.
3035	Line Material Company		Hardware	33.99	Portland, Ore.
3052	Truscon Steel Company	18,841#	Steel	618.77	Portland, Ore.
3052	Truscon Steel Company	6,061#	Steel	199.71	Portland, Ore.
3052	Truscon Steel Company	17,862#	Steel	577.99	Portland, Ore.
3054	Wash. Cor. Culvert Co.		Pipe	1,565.87	Berkeley, Cal.
3087	Bucyrus-Erie Co.		Shovel Parts	206.00	Evansville, Ind.
3087	Bucyrus-Erie Co.		Shovel Parts	90.05	So. Milwaukee, Wis.
3091	Westinghouse Elec. & M. Co.	20	Rectox	120.00	E. Pittsburgh, Pa.
3095	Austin-Western Road M. Co.		Grader Parts	51.30	Portland, Ore.
3101	Col. Steel Co.	7,328#	Steel	218.85	San Fran., Cal.
3101	Col. Steel Co.	8,970#	Steel	255.20	San Fran., Cal.
3101	Col. Steel Co.	87,873#	Steel	2,560.03	San Fran., Cal.
3102	Colyear Motor Sales		Truck Parts	10.07	Factory
3102	Colyear Motor Sales		Truck Parts	7.05	Factory
3105	Elec. Steel Fdry Co.		Shovel Bucket	1,246.50	Portland, Ore.
3105	Elec. Steel Fdry Co.		Repair Parts—		

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EXHIBIT TO AFFIDAVIT—Continued

Voucher No.	Vendor's Name	Quantity	Description	Cost	Origin of Shipment
			Shovels	82.50	Portland, Ore.
3105	Elec. Steel Fdry Co.		"	87.50	Portland, Ore.
3105	Elec. Steel Fdry Co.		"	169.35	Portland, Ore.
3105	Elec. Steel Fdry Co.		"	84.00	Portland, Ore.
3105	Elec. Steel Fdry Co.		"	137.15	Portland, Ore.
3105	Elec. Steel Fdry Co.		"	55.20	Portland, Ore.
3105	Elec. Steel Fdry Co.		"	83.70	Portland, Ore.
[fol. 73]					
3108	General Electric Co.	106-gal.	Oil.	33.92	Portland, Ore.
3115	Harnischfeger Sales Corp.		Welder Parts	2.75	Milwaukee, Wis.
3116	J. E. Haseltine Co.		Hardware	247.50	Portland, Ore.
3116	J. E. Haseltine Co.		Arc Welder	645.00	Portland, Ore.
3116	J. E. Haseltine Co.		Arc Welder	645.00	Portland, Ore.
3116	J. E. Haseltine Co.		Hardware	180.00	Portland, Ore.
3116	J. E. Haseltine Co.		Hardware	132.00	Portland, Ore.
3116	J. E. Haseltine Co.		Welding Rods	230.00	Portland, Ore.
3116	J. E. Haseltine Co.		Hardware	127.00	Portland, Ore.
3116	J. E. Haseltine Co.		Hardware	(red) 15.90	Portland, Ore.
3116	J. E. Haseltine Co.		Hardware	(red) 27.36	Portland, Ore.
3116	J. E. Haseltine Co.		Hardware	6.00	Portland, Ore.
3116	J. E. Haseltine Co.		Hardware	20.25	Portland, Ore.
3116	J. E. Haseltine Co.		Hardware	12.00	Portland, Ore.
3118	Howard-Cooper Corporation		Truck Parts	367.90	Dover, N. J.
3119	Ingersoll-Rand Company		Drill Parts	145.50	Butte, Mont.
3119	Ingersoll-Rand Company		Wrench Parts	330.95	Athena, Pa.

3119	Ingersoll-Rand Company		Oil Burner Assembly	25.45	Butte, Mont.
3119	Ingersoll-Rand Company		Hose	129.08	Butte, Mont.
3119	Ingersoll-Rand Company	15 doz.	Jackbits	43.20	Butte, Mont.
3119	Ingersoll-Rand Company	3	Chippers	165.00	San Fran., Cal.
3119	Ingersoll-Rand Company		Wrench Parts	8.90	Athens, Pa.
3119	Ingersoll-Rand Company	1	Chipper	55.00	Los Ang., Cal.
3119	Ingersoll-Rand Company		Drill Parts	2,602.00	Los Ang., Cal.
3119	Ingersoll-Rand Company	1	Chipper	55.00	San Fran., Cal.
3122	Jeffrey Man. Co.		Conveyor Parts	87.00	Columbus, O.
3122	Jeffrey Man. Co.		Conveyor Parts	3,160.50	Columbus, O.
3131	Marshall-Wells Co.	4 kgs.	Track Spikes	40.80	Portland, Ore.
3131	Marshall-Wells Co.	169' 9"	Black Pipe	254.40	Portland, Ore.
3132	Jas. H. Matthews & Co.	2sts.	Figures	28.68	Pittsburgh, Pa.

[fol. 74]

3135	Pac. Coast Steel Corp.	20#	Steel	53.28	San Fran., Cal.
3135	Pac. Coast Steel Corp.	105,590#	Steel	2,123.18	Lackawanna, Pa.
3135	Pac. Coast Steel Corp.	117,820#	Steel	2,353.27	Lackawanna, Pa.
3135	Pac. Coast Steel Corp.	112,000#	Steel	2,234.77	Lackawanna, Pa.
3135	Pac. Coast Steel Corp.	112,190#	Steel	2,232.55	Lackawanna, Pa.
3135	Pac. Coast Steel Corp.	8,650#	Steel	375.84	Los Ang., Cal.
3135	Pac. Coast Steel Corp.	138,030#	Steel	2,308.15	Johnstown, Pa.
3135	Pac. Coast Steel Corp.	82,936#	Steel	1,565.49	Johnstown, Pa.
3135	Pac. Coast Steel Corp.	2,616#	Steel	45.91	Johnstown, Pa.
3155	Wallace & Tiernan Sales Cor.	1	500-CC. Solution	2.75	Newark, N. J.
3155	Wallace & Tiernan Sales Cor.	2sts.	Gaskets, etc.	6.05	Newark, N. J.
3155	Wallace & Tiernan Sales Cor.	12	Screens	5.28	Newark, N. J.
3155	Wallace & Tiernan Sales Cor.	12	Tubes	16.56	Newark, N. J.
3133	Nine Safety Appliances Co.	24	Skullguards	66.00	Pittsburgh, Pa.
3163	Woodbury Co.	2,362 ft.	Tubes	1,208.67	Portland, Ore.

EXHIBIT TO AFFIDAVIT—Continued

Voucher No.	Vendor's Name	Quantity	Description	Cost	Origin of Shipment
3163	Woodbury Co.	2	Valves	23.80	Portland, Ore.
3163	Woodbury Co.	4	Hoists	192.60	Portland, Ore.
3163	Woodbury Co.	3	Hoists	165.24	Portland, Ore.
3164	Bucyrus-Erie Co.		Shovel Parts	142.60	Portland, Ore.
3164	Bucyrus-Erie Company		Shovel Parts	15.40	San Fran., Cal.
3164	Bucyrus-Erie Company		Price Cor.	(red) 50.00	Portland, Ore.
3177	Bucyrus-Erie Company		Shovel Parts	1,048.86	Harvey, Ill.
3181	Beall Pipe & Tank Co.	1,000′	Pipe	532.50	Portland, Ore.
3181	Beall Pipe & Tank Co.	260′	Culvert	1,777.75	Portland, Ore.
3183	Bucyrus-Erie Company	1	Fan & Drive	125.00	Evansville, Ind.
3206	Cdine Hdwe & Fdry Co.	60′	Pipe	25.00	Wallace, Idaho
3206	Cdine Hdwe & Fdry Co.	300′	Pipe	94.00	Wallace, Idaho
3209	Feenaughty Mach. Co.	1	Motor	1,120.00	Lorain, Ohio
3209	Feenaughty Mach. Co.	1	Bill Crank	9.06	Portland, Ore.
3210	Fyr-Fyter Co.		Fyr-Fyter Fluid	116.10	Dayton, Ohio

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3210	Fyr-Fyter Co.		Fyr-Fyter refills	101.25	Dayton, Ohio
3210	Fyr-Fyter Co.	30-gal.	Foamite	108.00	Dayton, Ohio
3211	Garlock Packing Co.		Packing	10.01	San Fran., Cal.
3211	Garlock Packing Co.		Sheet Packing	27.30	San Fran., Cal.
3211	Garlock Packing Co.	600	Clutch Links	90.00	Palmyra, N. Y.
3215	Marshall-Wells Co.	900′	Galv. Cloth	72.00	Portland, Ore.
3215	Marshall-Wells Company		Additional Chge	132.15	Portland, Ore.
3215	Marshall-Wells Company	500 Bx	Belt fastners	920.00	Chicago, Ill.
3215	Marshall-Wells Company		Belt tools	172.27	Chicago, Ill.

3215	Marshall-Wells Company	2	Vises	52.35	Portland, Ore.
3215	Marshall-Wells Company		Belt tools	352.36	Chicago, Ill.
3215	Marshall-Wells Company		Belt tools and lacing	946.22	Chicago, Ill.
3215	Marshall-Wells Company	6	Jacks	193.50	Pittsburg, Pa.
3215	Marshall-Wells Company	500 Bx	Belt lacing	920.00	Chicago, Ill.
3215	Marshall-Wells Company		Set screws & wrenches	3.89	Chicago, Ill.
3215	Marshall-Wells Company	200	Nuts	34.83	Portland, Ore.
3215	Marshall-Wells Company	120	Valve leathers	70.02	Greensburg, Pa.
3215	Marshall-Wells Company	200	Cap screws	81.11	St. Louis, Mo.
3215	Marshall-Wells Company	43 rls.	Mesh	88.58	Portland, Ore.
3220	Koehring Co.	2	Assemblies for 301-2B	3,657.00	Milwaukee, Wis.
3229	Fowler Mfg. Co.	2	Heaters	68.91	Portland, Ore.
3238	Bolser Mach. Co.	1	Locomotive	4,500.00	Portland, Ore.
3242	Bucyrus-Erie Co.		Shovel pts.	371.00	S. Milwaukee, Wis.
3242	Bucyrus-Erie Co.	2	Dipper sticks	1,200.20	S. Milwaukee, Wis.
3242	Bucyrus-Erie Co.	1	Pump Assembly	126.30	Harvey, Ill.
3200	Silas Mason Company	2	Transformers	5,500.00	New York City
JV-704	Jeffrey Mfg. Co.	2	Aerators	1,821.00	Columbus, Ohio
4168	Blaw Knox Co.	24	Buckets	15,420.00	Blaw Knox, Pa.
JV-779	Jeffrey Mfg. Co.		Screen Conveyor	5,400.00	Columbus, Ohio
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JV-812	Jeffrey Mfg. Co.		Cement hdlg conveyor	13,150.17	Columbus, Ohio
3858	Worthington Co. Inc.	2	Compressors and Air Receivers	3,035.60	Buffalo, N. Y.
5351	Davenport-Bessler Corp.	2	Locomotives	12,356.00	Davenport, Ia.
5351	Davenport-Bessler Corp.	2	Locomotives	12,356.00	Davenport, Ia.
4174	Davenport-Bessler Corp.	6	Locomotives	37,068.00	Davenport, Ia.
6002	Davenport-Bessler Corp.	2	Locomotives	12,356.00	Davenport, Ia.
4315	J. Hendy Iron Works	1	Skip Hoist	8,070.00	Sunnyville, Cal.
4681	J. Hendy Iron Works	1	Skip Hoist	8,070.00	Sunnyville, Cal.

Voucher No.	Vendor's Name	Quantity	Description	Cost	Origin of Shipment
4263	Koppel Ind. Car & Eqpt. Co.	10	Cars	13,250.00	Koppel, Pa.
5779	Koppel Ind. Car & Eqpt. Co.	6	Cars	7,788.00	Koppel, Pa.
5955	Koppel Ind. Car & Eqpt. Co.	4	Cars	5,300.00	Koppel, Pa.
3991	Industrial Equipment Co.	1	Fluxo Pump	5,000.00	Boulder City, Nev.
3947	Pittsburgh Des Moines Steel Co.	10	Silos	29,784.46	Des Moines, Ia.
4115	Westinghouse Elec. & Mfg. Co.		Control Eq.	8,737.96	Pittsburgh, Pa.
4275	King Brothers		Steel	5,238.87	Portland, Ore.
4539	King Brothers		Steel	8,514.38	Portland, Ore.
5369	King Brothers		Steel	477.64	Portland, Ore.
3573	Columbia Steel Co.	2,600'	Pipe	2,949.41	Portland, Ore.
4056	Worthington Co.		Pump Parts	879.50	Harrison, N. J.
3892	Fuller Co.		Cement Unload Equpt.	16,725.00	Catasauqua, Pa.
JV-727	Jeffrey Mfg. Co.		Conveyor Pts.	1,295.16	Columbus, O.
JV-812	Jeffrey Mfg. Co.	1	Airplane Tripper	18,400.00	Columbus, O.
JV-704	Jeffrey Mfg. Co.		Conveyors	17,778.15	Columbus, O.
JV-758	Jeffrey Mfg. Co.		Conveyors	10,711.46	Columbus, O.
JV-704	Jeffrey Mfg. Co.		Conveyors	14,264.76	Columbus, O.
JV-758	Jeffrey Mfg. Co.		Conveyors	134.40	Columbus, O.
JV-758	Jeffrey Mfg. Co.		Belt Fedrs.	4,855.00	Columbus, O.
JF-704	Jeffrey Mfg. Co.		Conveyors	11,342.23	Columbus, O.
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JV-758	Jeffrey Mfg. Co.		Conveyors	501.50	Columbus, O.
JV-704	Jeffrey Mfg. Co.		Conveyors	15,623.20	Columbus, O.
JV-758	Jeffrey Mfg. Co.		Conveyors	12,718.88	Columbus, O.
JV-816	Columbia Steel Company		Suspension Bridge	38,334.59	Worcester, Mass.

JV-882	Columbia Steel Company			18,111.29	Worcester, Mass.
3251	Bucyrus-Erie Company		Shovel Repair Parts	119.78	Erie, Pa.
3267	W. L. Parker	3	Used compressors	13,500.00	New York City
3270	Columbia Steel Co.	77,551#	Steel	2,461.19	Portland, Ore.
3274	Brown-Bevis Co.	25 doz.	Shovels	275.00	Los Ang., Cal.
3282	Byron-Jackson Co.		Pump Repair Pts.	119.35	Berkeley, Cal.
3287	Line Materials Co.	50	Cross arms	50.00	Portland, Ore.
3287	Line Materials Co.	100	Cross arms	100.00	Portland, Ore.
3287	Line Materials Co.	50	Cross arms	43.34	Portland, Ore.
3287	Line Materials Co.	100	Braces	15.85	Portland, Ore.
3291	Pac. Mach. & Tool Steel Co.	10#	Nickel Steel	.83	Portland, Ore.
3291	Pac. Mach. & Tool Steel Co.	33#	Bits	54.24	Portland, Ore.
3299	Truscon Steel Co.	2,578#	Steel	83.08	Portland, Ore.
3299	Truscon Steel Co.	1,161#	Steel	37.09	Portland, Ore.
3299	Truscon Steel Co.	24,422#	Steel	795.12	Portland, Ore.
3299	Truscon Steel Co.	1,448#	Steel	43.07	Portland, Ore.
3299	Truscon Steel Co.	17,811#	Steel	538.02	Portland, Ore.
3299	Truscon Steel Co.	3,785#	Steel	124.72	Portland, Ore.
3299	Truscon Steel Co.	1,536#	Steel	52.15	Portland, Ore.
3299	Truscon Steel Co.	1,396#	Steel	44.60	Portland, Ore.
3299	Truscon Steel Co.	13,446#	Steel	460.06	Portland, Ore.
3299	Truscon Steel Co.	5,172#	Steel	166.59	Portland, Ore.
3299	Truscon Steel Co.	4,176	Steel	136.43	Portland, Ore.
3299	Truscon Steel Co.	19,944#	Steel	115.04	Portland, Ore.
3299	Truscon Steel Co.	3,576#	Steel	119.52	Portland, Ore.
3299	Truscon Steel Co.	1,519#	Steel	49.94	Portland, Ore.

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3300	Westinghouse E. & M. Co.		Electric Supplies	35.75	Muskegon, Mich.
3316	Westinghouse E. & M. Co.		Air Compressor Pts.	506.15	Emeryville, Cal.

Voucher No.	Vendor's Name	Quantity	Description	Cost	Origin of Shipment
3318	Worthington Co.	2	Water Coolers	23.00	Cleveland, O.
3324	Allis-Chalmers Mfg. Co.	2	Screens	8,000.00	West Allis, Wis.
3329	Ralph N. Brodie Co.		Plates & Gaskets	23.00	Oakland, Cal.
3339	Skinner Purifiers Inc.	19	Packs	62.70	Detroit, Mich.
3339	Skinner Purifiers Inc.	1	Packs	3.30	Detroit, Mich.
3343	Steel Tank & Pipe Co.	4,570'	Steel Pipe	4,840.50	Portland, Ore.
3372	E. I. DuPont deNemours Co.	5,000	Bags	11.00	Birmingham, Ala.
3373	Elec. Steel Fdry Co.		Shovel Parts	75.00	Portland, Ore.
3373	Elec. Steel Fdry Co.		Shovel Parts	126.00	Portland, Ore.
3373	Elec. Steel Fdry Co.		Shovel Parts	69.00	Portland, Ore.
3373	Elec. Steel Fdry Co.		Shovel Parts	342.00	Portland, Ore.
3379	Graybar Elec. Co.	1,003'	Cable	866.79	Bridgeport, Conn.
3379	Graybar Elec. Co.		Elec. Sup.	89.00	Portland, Ore.
3379	Graybar Elec. Co.		Elec. Sup.	188.84	Portland, Ore.
3379	Graybar Elec. Co.	2,006'	Wire	270.81	San Fran., Cal.
3379	Graybar Elec. Co.	300'	Cable	100.43	San Fran., Cal.
3379	Graybar Elec. Co.	3'	Tubing	5.40	Schenectady, N. Y.
3379	Graybar Elec. Co.	4	Switches & 8 heaters	62.92	Portland, Ore.
3379	Graybar Elec. Co.	40	P. B. Stations	72.00	San Fran., Cal.
3379	Graybar Elec. Co.	20	Sockets	12.00	Lynn, Mass.
3379	Graybar Elec. Co.	1,003'	Cable, 10 cutouts	177.53	Bridgeport, Conn.
3379	Graybar Elec. Co.	10	Covers	32.00	Pittsburg, Mass.
3379	Graybar Elec. Co.	1	Valve	38.70	Salem, Mass.
3381	Ingersoll-Rand Co.		Drill & Compressor parts	4.80	Athens, Pa.
3381	Ingersoll-Rand Co.		"	28.95	Butte, Mont.
3381	Ingersoll-Rand Co.		"	322.15	Butte, Mont.

3381	Ingersoll-Rand Co.		"	3.30	Phillipsburg, N. J.
3381	Ingersoll-Rand Co.		"	30.25	Athens, Pa.
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3381	Ingersoll-Rand Co.		Drill & Compressor parts	110.85	Butte, Mont.
3381	Ingersoll-Rand Co.		"	422.96	San Fran., Cal.
3381	Ingersoll-Rand Co.		"	24.00	Athens, Pa.
3381	Ingersoll-Rand Co.		"	2.75	Athens, Pa.
3381	Ingersoll-Rand Co.		"	151.65	Butte, Mont.
3381	Ingersoll-Rand Co.		"	44.00	Butte, Mont.
3381	Ingersoll-Rand Co.		"	141.90	Butte, Mont.
3381	Ingersoll-Rand Co.		"	162.40	Butte, Mont.
3381	Ingersoll-Rand Co.		"	309.35	Butte, Mont.
3381	Ingersoll-Rand Co.		"	120.00	Butte, Mont.
3381	Ingersoll-Rand Co.		"	359.83	Athens, Pa.
3387	Marion Steam Shovel Co.		Shovel Repair Pts.	27.30	Erie, Pa.
3388	Marshall-Wells Co.		Drill Parts	16.24	Chicago, Ill.
3388	Marshall-Wells Co.		Drill Parts	3.60	Chicago, Ill.
3388	Marshall-Wells Co.		Hardware	9.25	.....
3388	Marshall-Wells Co.		Hardware	7.20	.....
3388	Marshall-Wells Co.		Hardware	22.32	.....
3388	Marshall-Wells Co.	550	Nuts	14.12	Portland, Ore.
3388	Marshall-Wells Co.	6'	Hose	1.80	.....
3388	Marshall-Wells Co.	2	Kegs Nuts	54.94	Worcester, Mass.
3391	Photostat Corporation		Photo Sup.	107.30	Rochester, Mass.
3394	Seattle Hdwe Co.		Hardware	2.37	Portland, Ore.
3394	Seattle Hdwe Co.		Hardware	3.71	Portland, Ore.
3394	Seattle Hdwe Co.		Hardware	6.50	.....
3402	Westinghouse E. & Mfg. Co.	3	Switches	40.32	Boulder City

Exhibit to Affidavit—Continued

Voucher No.	Vendor's Name	Quantity	Description	Cost	Origin of Shipment
3402	Westinghouse E. & Mfg. Co.	2	motors	810.90	Emerville, Cal.
3412	Gen. Elec. Sup. Corp.		Elec. Supplies	14.25	Portland, Ore.
3424	Allis-Chalmers Mfg. Co.	5	Transformers	1,192.50	Milwaukee, Wis.
3429	Feenaughty Mach. Co.		Shovel Rep. Parts	18.90	Portland, Ore.
3429	Feenaughty Mach. Co.		"	18.90	Portland, Ore.

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3430	Fyr-Fyter Co.	4	Fire Extinguishers	198.00	Tonasket, Wash.
3430	Fyr-Fyter Co.		Refills	116.10	Tonasket, Wash.
3440	Worthington Co.	1	Pump	378.40	Harrison, N. J.
3440	Worthington Co.	2	Pumps	3,801.25	Harrison, N. J.
3440	Worthington Co.	2	Pumps	658.90	Harrison, N. J.
3460	Amer. Air Filter Co.	3	Filters	614.70	Louisville, Ky.
3461	Balser Mach. Co.	1,500'	Rubber Strip	450.00	Youngstown, O.
3466	Pac. Mach. & Tool Steel Co.	296#	Tubing	46.51	Portland, Ore.
3475	Bucyrus-Erie Co.		Shovel Pts.	241.05	Harvey, Ill.
3475	Bucyrus-Erie Co.		Shovel Pts.	20.50	Harvey, Ill.
3484	Balser Mach. Co.	2	Compressors	1,603.36	Portland & Quincy, Ill.
3485	Beall Pipe & Tank Corp.		Pipe & Fittings	3,250.65	Portland, Ore.
3487	Binks Mfg. Co.	160	Nozzles	475.20	Chicago, Ill.
3488	Bucyrus-Erie Co.		Shovel Parts	91.50	Harvey, Ill.
3493	Gen. Elec. Co.	2	Transformers	311.64	Portland, Ore.
3493	Gen. Elec. Co.		Electrical Supplies	9.32	Portland, Ore.
3493	Gen. Elec. Co.		"	130.50	Portland, Ore.
3493	Gen. Elec. Co.		"	1.31	Bloomfield, N. J.
3493	Gen. Elec. Co.		"	40.61	Lynn, Mass.
3495	Hughes & Co.		Plumbing & Heat. Supplies	816.64	.....
3495	Hughes & Co.		"	26.08	Kewanee, Ill.

3495	Hughes & Co.		"	887.52	Kewanee, Ill.
3495	Hughes & Co.		"	27.96	Kewanee, Ill.
3495	Hughes & Co.		"	11.70	Pa.
3495	Hughes & Co.		"	745.00	New York City
3495	Hughes & Co.		"	265.60	New York City
3495	Hughes & Co.		"	555.72	Oakland, Cal.
4682	Columbia Steel Co.	5,805,964#	Trestle Steel	214,820.67	Gary, Ind.
5313	Columbia Steel Co.	3,886,766#	Trestle Steel	143,810.34	Gary, Ind.
3497	Jeffrey Mfg. Co.	6	Idlers	1,020.00	Columbus, O.

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3497	Jeffrey Mfg. Co.		Conveyor Pts.	2,221.48	Columbus, O.
3497	Jeffrey Mfg. Co.		Conveyor Pts.	2,334.50	Columbus, O.
3497	Jeffrey Mfg. Co.		Conveyor Pts.	377.24	Columbus, O.
3497	Jeffrey Mfg. Co.		Conveyor Pts.	37.50	Columbus, O.
3497	Jeffrey Mfg. Co.		Conveyor Pts.	90.68	Columbus, O.
3497	Jeffrey Mfg. Co.		Conveyor Pts.	87.00	Columbus, O.
3497	Jeffrey Mfg. Co.		Conveyor Pts.	370.97	Columbus, O.
3497	Jeffrey Mfg. Co.		Conveyor Pts.	90.00	Columbus, O.
3501	Pac. Mach. & Tool Steel Co.	19	Bits	13.42	Portland, Ore.
3505	Remington Rand, Inc.		Carbon Paper	4.22	Bridgeport, Conn.
3520	Chase Brass & Copper Co.	56#	Brass	13.26	Waterbury, Conn.
3527	Marshall-Wells Co.		Hardware	43.86	Worcester, Mass.
3573	Columbia Steel Company	2,776#	Steel	78.98	Portland, Ore.
3573	Columbia Steel Company	63,329#	Steel	1,842.49	Portland, Ore.
3600	Harnischfeger Sales Corp.		Elec. Sup.	20.72	Milwaukee, Wis.
3622	Crucible Steel Co.	62,315#	Steel	6,543.08	Pittsburgh, Pa.
3630	J. A. Roebling's Sons Co.	1,200#	SF Steel mesh	481.92	San Fran., Cal.
3630	J. A. Roebling's Sons Co.	285	SF Steel mesh	(red) 114.46	San Fran., Cal.
3660	Monarch Forge & Mach. Wks.	2	Pinions	330.00	Portland, Ore.
3675	Balser Mach. Co.	1,000'	Belt	6,989.26	Youngstown, O.
			Total	899,390.91	

[fol. 82] AFFIDAVIT OF ARNOLD HANGER

STATE OF WASHINGTON,
County of Spokane, ss:

Arnold Hanger, being first duly sworn, on his oath, says: I am the treasurer and a substantial shareholder of the Silas Mason Company and also of the Mason-Hanger Company, and have been such treasurer at all times since the Silas Mason Company participated with the Walsh Construction Company and the Atkinson-Kier Company in entering into the contract with the United States on July 16, 1934, for the construction of the Grand Coulee Dam.

The Silas Mason Company was organized by the shareholders of the Mason-Hanger Company, comprised chiefly of members of the Mason and Hanger families in 1926, but members of the Mason and Hanger families have been associated in the contracting business either as the Mason-Hanger Company or as Mason and Hanger since 1830. Ever since the organization of the Silas Mason Company it has been in close affiliation with the Mason-Hanger Company, the two companies having the same officers and substantially the same stockholders. Ever since the Silas Mason Company was organized, and, during all of said time and for many years prior thereto, the Mason-Hanger Company and the Silas Mason Company have both had their headquarters in New York City and Lexington, Kentucky, and have carried on a general contracting business chiefly in the northeastern part of the United States. The nature and character of their work and its location is indicated by their chief contracts during the past ten years, which are as follows: In 1928 the Silas Mason Company built pier foundations pursuant to a $2,000,000 contract, with headquarters in New Jersey, for a bridge across the Hudson River, and in the same year was engaged on a compressed air tunnel job for $200,000 in Philadelphia. In the year 1932 the Silas Mason Company completed a vehicular tunnel in Boston under a $5,000,000 contract. The Mason-Hanger Company and the Silas Mason Company [fol. 83] are still engaged in building the Midtown Hudson Tunnel connecting Manhattan and Weehawken for a contract price of approximately $7,000,000. In 1934-5 the Silas Mason Company became associated with the Walsh Con-

struction Company in the construction of a dam at Fort Peck, Montana. This was an $8,000,000 job and the Silas Mason Company finished its participation therein in 1935. This has been the first time it engaged in any contract so far west.

July 16, 1934, it associated itself with the Walsh Construction Company and with the Atkinson-Kier Company in entering into a contract with the United States Government above referred to, and thereupon joined with its co-contractors in forming Mason-Walsh-Atkinson-Kier Company as an agency of the three companies in doing the work on the Grand Coulee dam project.

The Silas Mason Company has transacted no business in the state of Washington other than through its corporate agent, Mason-Walsh-Atkinson-Kier Company and, as the Silas Mason Company continues its extensive operations in contracting at its offices in New York City and in Lexington, Kentucky, I am the only corporate officer of the Silas Mason Company at the Coulee Dam project and am obliged to divide my time here with time spent at the principal offices of the Silas Mason Company. I am not even temporarily residing in the state of Washington but merely make trips at intervals of three or four months to Mason City for the purpose of going over matters with the officials of the Mason-Walsh-Atkinson-Kier Company, who are performing the contract.

Neither the Silas Mason Company nor the Mason-Walsh-Atkinson-Kier Company have bid upon or accepted any other contracts within the state of Washington, and it is contemplated that when the Grand Coulee contract is completed the Mason-Walsh-Atkinson-Kier Company will have served its purpose and will not continue in business. The Silas Mason Company will continue its business at its headquarters in New York and in Lexington and has no plan or expectation of bidding upon any other work or of engag- [fol. 84] ing in any business at any time in the state of Washington, save and except as other work in connection with the Grand Coulee project may be awarded to the Mason-Walsh-Atkinson-Kier Company or some one or more of its stockholders by the United States Government.

(Subscribed and sworn to.)

[fol. 85] AFFIDAVIT OF THOMAS J. WALSH, JR.

STATE OF WASHINGTON,
County of Okanogan, ss:

Thomas J. Walsh, Jr., being first duly sworn, on his oath, says: My father, Thomas J. Walsh Sr., is the president and chief executive officer of the Walsh Construction Company, one of the companies which, on the 16th day of July, 1934, entered into a contract with the United States Government for the construction of Grand Coulee dam. I make this affidavit solely because there is no officer of the Walsh Construction Company within the state of Washington and because I am familiar with the facts herein set forth. I have no official position or connection with the Walsh Construction Company and am employed at Mason City as foreman of the Mason-Walsh-Atkinson-Kier Company.

The Walsh Construction Company has been engaged in business for the past 25 or 30 years, with its home office at Davenport, Iowa, and in later years has had a branch office at Indianapolis, Indiana, Los Angeles, California, and Syracuse, New York. It established an office in Los Angeles because it bid upon and was successful in obtaining a contract for the construction of a water system for the Metropolitan Water District of Los Angeles, which contract is still unfinished. The only other business it has engaged in in the far west was in association with the Silas Mason Company when the two companies joined in bidding on and received a contract from the United States government for the construction of a dam at Fort Peck, which it finished in 1935. Other than these two jobs, its contracting work has chiefly been in railroad construction east of the Mississippi. Its last big jobs were for the New York Central, a $5,000,000 contract, for grading its road bed, and another job for the Delaware and Lackawanna, involving $1,500,000, of a similar nature. I mention these two contracts because they are typical of the work it has done throughout its corporate existence.

[fol. 86] At no time has the Walsh Construction Company engaged in any business in the state of Washington and it maintains no office in the state of Washington. So far as participating in the performance of the contract of July 16, 1934, for the construction of the Grand Coulee dam, its

participation in this work is solely through its corporate agent, the Mason-Walsh-Atkinson-Kier Company, of which my father, Thomas J. Walsh Sr., is president. The Walsh Construction Company has no plan or expectation of bidding upon any other work or engaging in any business at any time in the state of Washington.

(Subscribed and sworn to.)

[fol. 87] AFFIDAVIT OF GEORGE H. ATKINSON

STATE OF WASHINGTON,
County of Okanogan, ss:

George H. Atkinson, being duly sworn, on his oath, says: I am one of the members of the partnership known as the Atkinson-Kier Company, which partnership consists of Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier. The co-partnership of Atkinson-Kier Company was formed by the above mentioned four men solely for the purpose of participating in bidding upon and entering into a contract with the United States government on July 16, 1934, for the construction of the Grand Coulee dam. Said partnership has at no time and does not now have any other business than the participation in the performance of said contract, which it conducts only through its corporate agent Mason-Walsh-Atkinson-Kier Company. When the Mason-Walsh-Atkinson-Kier Company completes said contract it is contemplated by the partners that the partnership of Atkinson-Kier Company will be dissolved.

The partnership consisting of Guy F. Atkinson and George H. Atkinson, heretofore doing business under the firm name of Guy F. Atkinson Company, ever since its establishment, had its chief office at San Francisco. It was dissolved December 28, 1935, and was succeeded by a corporation, operating under the same name, which corporation will continue its contracting business chiefly from its headquarters at San Francisco. The partnership transacted its business chiefly in the state of California, with some business in Oregon.

(Subscribed and sworn to.)

[fol. 88] AFFIDAVIT OF WM. E. KIER

STATE OF WASHINGTON,
County of Okanogan, ss:

William E. Kier, being duly sworn, on his oath, says: I am one of the members of the partnership known as the Atkinson-Kier Company, which partnership consists of Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier. The co-partnership of Atkinson-Kier Company was formed by the above mentioned four men solely for the purpose of participating in bidding upon and entering into a contract with the United States government on July 16, 1934, for the construction of the Grand Coulee dam. Said partnership has at no time and does not now have any other business than the participation in the performance of said contract, which it conducts only through its corporate agent, Mason-Walsh-Atkinson-Kier Company. When the Mason-Walsh-Atkinson-Kier Company completes said contract it is contemplated by the partners that the partnership of Atkinson-Kier Company will be dissolved.

The partnership consisting of William E. Kier and Elmer L. Kier has been engaged for a number of years in the contracting business and during all of said period has had its chief office at San Diego, California, where it continues to transact its business as such co-partnership. That co-partnership of late years has transacted practically all of its business in California and Arizona, although in earlier years it did contracting work in Wyoming and Arkansas and certain other Southern states, as well as California and Arizona.

(Subscribed and sworn to.)

[fol. 89] DEFENDANTS' EVIDENCE

At the conclusion of plaintiffs' showing, the defendants filed their motion to dismiss the complaint, and offered in evidence and the court thereupon received in evidence a certified copy of the rules and regulations of the Tax Commission of the state of Washington, adopted October 16th, 1935, relating to Title IV, Chapter 180, Laws of Washing-

ton of 1935, the only material portions of which rules and regulations are set forth in paragraph 6 of the complaint herein and in Supplemental Finding of Fact No. II heretofore filed in the above cause. The defendant thereupon rested and took said application for interlocutory injunction under advisement.

At the hearing on said application for an interlocutory injunction, plaintiffs introduced no evidence in support of the contention made by them in paragraph 9, subdivision "h" of the complaint, wherein it is alleged that the said compensating tax provided for in Title IV, Chapter 180, Session Laws of Washington of 1935, is not collectible from plaintiffs by reason of the alleged ownership by the United States of the land whereon said dam is being constructed, and at said hearing the attorney for plaintiffs stated in open court that plaintiffs made no claim that said plaintiffs were entitled to an interlocutory injunction in the above cause by reason of the alleged facts set forth in said paragraph 9, subdivision "h", but that plaintiffs would submit evidence in support of their prayer for a permanent injunction, but not otherwise.

Wherefore defendants pray that the above statement of evidence be settled, approved and allowed by the above-entitled court as a true, full, correct and complete statement of all of the evidence necessary for a review of the rulings assigned as error on the appeal of said defendants taken and given on the hearing of said application for an interlocutory injunction and the order to show cause entered June 5, 1936, pursuant to said application, for use on the appeal of said defendants from the order for inter- [fol. 90] locutory injunction entered in the above cause against the defendants on September 16th, 1936, taken to the Supreme Court of the United States.

Dated this 21st day of September, 1936.

G. W. Hamilton and R. G. Sharpe, Attorneys for Defendants.

[fol. 91] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO STATEMENT OF EVIDENCE

It is hereby stipulated and agreed by and between counsel for plaintiffs and counsel for defendants that the foregoing proposed statement of the evidence is a true, full, correct and complete statement of all of the evidence necessary for a review of the rulings assigned as error on the appeal of said defendants taken and given on the hearing of said application for an interlocutory injunction and the order to show cause entered on June 5, 1936, pursuant to said application, for use on the appeal of said defendants from the order for interlocutory injunction entered in the above cause against the defendants on September 16th, 1936, taken to the Supreme Court of the United States; that said plaintiffs hereby waive notice of the lodgement thereof with the clerk of the above court as provided by Equity Rule 75, or any notice thereof whatever, and hereby consent that said proposed statement of the Evidence may be approved by the Court on the form of order thereto attached, without further or any notice to said plaintiffs or their attorneys.

Dated this 21st day of September, 1936.

Graves, Kizer and Graves, Attorneys for Plaintiffs.
W. G. Graves and B. H. Kizer, Solicitor for Plaintiffs. G. W. Hamilton and R. G. Sharpe, Attorneys for Defendants.

[fol. 92] IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE

On this day came on for consideration the matter of the approval of the Statement of the Evidence lodged by the defendants, and it appearing to the Court that the plaintiffs and defendants have stipulated that said Statement is true, complete and properly prepared, and that the same may be approved by this form of order without notice to the plaintiffs or their attorneys as required by Equity Rule 75 or at all, and it further appearing that such statement is true, complete and properly prepared, It is Ordered by the Court that the same be and is hereby approved as part

of the record herein, for the purpose of the appeal of said defendants to the United States Supreme Court from the order granting interlocutory injunction entered herein September 16th, 1936.

Done in open court this 21st day of September, 1936.

J. Stanley Webster, District Judge.

Approved as to form and substance:

Graves, Kizer and Graves, Attorneys for Plaintiffs.

W. G. Graves and B. H. Kizer, Solicitor- for Plaintiffs. G. W. Hamilton and R. G. Sharpe, Attorneys for Defendants.

[fol. 93] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed September 21, 1936

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Supreme Court pursuant to the appeal allowed in the above-entitled cause, and to include in such transcript of record the following, and no other, papers and exhibits, to-wit:

1. Complaint;
2. Application for interlocutory injunction;
3. Order to show cause on application for interlocutory injunction;
4. Order assembling three-judge court;
5. Notice to Governor, etc.;
6. Defendants' motion to dismiss action;
7. Minute entry as to hearing on application for interlocutory injunction;
8. Opinion and dissenting opinion on application for interlocutory injunction;
9. Plaintiffs' motion that opinion be adopted as findings of fact and conclusions of law, etc.;
10. Findings of Fact and Conclusions of Law;

11. Defendants' exceptions to Findings of Fact and Conclusions of Law;
[fol. 94] 12. Order for interlocutory injunction;
13. Defendants' petition for appeal;
14. Order allowing appeal;
15. Defendants' assignments of errors:
16. Cost bond on appeal;
17. Citation on appeal;
18. Statement of jurisdiction;
19. Statement and proof of service of appeal papers;
20. Statement of Evidence;
21. Præcipe for transcript of record;
22. Appellees' Waiver of Objections to Jurisdiction.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States, and to be filed in the office of the clerk of said last-named court, together with the original citation on or before November 20th, 1936, or such additional time as is allowed therefor.

Dated this 21st day of September, 1936.

G. W. Hamilton and R. G. Sharpe, Attorneys for Defendants. Graves, Kizer and Graves, Attorneys for Plaintiffs. W. G. Graves and B. H. Kizer, Solicitor- for Plaintiffs.

[fols. 95-98] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 99] IN SUPREME COURT OF THE UNITED STATES

APPELLANTS' STATEMENT OF POINTS RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed October 9, 1936

Points Relied Upon by Appellants

Appellants intend to rely upon the following points as ground for the reversal of the order granting an interlocutory injunction from which the appeal is taken:

(1) Title IV, Chapter 180, Laws of Washington of 1935, imposes upon every person in the state of Washington a

tax or excise for the privilege of using within said state any article of tangible personal property purchased subsequent to April 30, 1935, equal to 2% of the purchase price thereof plus costs of transportation to place of use, with an off-set of any use or sales tax paid thereon either in Washington or in any other state. The order appealed from adjudges the provisions of said statute are null and void and the tax imposed thereby is illegal and unenforceable as against appellees, and grants an interlocutory injunction restraining appellants, both individually and as the Tax [fol. 100] Commission of the state of Washington, during the pendency of said suit from enforcing or attempting to enforce the collection of said tax from appellees.

The district court erred in entering said order in that the same was based upon the sole but erroneous ground that said state statute and the tax thereby imposed, as measured by the purchase price and transportation costs of tangible personal property purchased by appellees outside of Washington and transported into and used by appellees in Washington, constitutes an unlawful burden on interstate commerce in violation of the commerce clause of the federal constitution.

(2) The district court erred in finding and concluding that the tax imposed by said state statute is, in effect, a tax upon purchases of materials made by persons within Washington, and within other states of the Union, whereas such tax is in truth and in fact a tax, not upon the purchase, but upon the use of such materials within the state of Washington.

(3) The court erred in finding and concluding that the tax imposed by said state statute was intended to and does discriminate against articles brought into Washington from other states in order to remove any competition with merchants of the state of Washington, whereas the record fails to show that any such discrimination was either intended or in fact exists.

(4) The court erred in finding and concluding that the tax imposed by said state statute is violative of the commerce clause of the federal constitution in that the tax is discriminating in its incidents against articles because of their origin in other states than Washington and that said statute was framed for the purpose of suppressing com-

petition from without the state of Washington, whereas the record fails to show any such discrimination or purpose either in the enactment of such state statute, or in the im-
[fol. 101] position of such tax.

Part of Record to be Printed

Appellants state that the whole of the record sent up from the District Court of the United States for the Eastern District of Washington, Northern Division, in accordance with the praecipe filed in said court jointly by appellants and appellees on or about September 21, 1936, is necessary for the consideration of the case.

Dated this 7th day of October, 1936.

G. W. Hamilton and R. G. Sharpe, Attorneys for Appellants.

[fol. 102] State of Washington,
County of Thurston, ss:

Orris L. Hamilton, being first duly sworn, on oath, deposes and says: That at all times herein mentioned affiant was and now is a citizen of the United States and of the state of Washington in no wise interested in the within entitled cause or appeal and competent to be a witness therein; that on the 7th day of October, 1936, affiant served the within and attached "Appellants' Statement of Points Relied Upon and Designation of Parts of Record to be Printed" upon the within named appellees, by depositing a true and correct copy thereof in the United States postoffice at Olympia, Washington, securely wrapped and with first-class postage thereon fully prepaid and plainly addressed to: "Messrs. Graves, Kizer and Graves, and Mr. W. G. Graves and Mr. B. H. Kizer, Attorneys at Law, Old National Bank Building, Spokane, Washington," said addressees being then and there the attorneys and solicitors for appellees in the within entitled appeal, and said address being then and there the business and postoffice address of each and all of said addressees.

Orris L. Hamilton.

Subscribed and sworn to before me this 7th day of October, 1936.

Harry L. Parr, Notary Public in and for the State of Washington Residing at Olympia. (Seal.)

[fol. 103] [File endorsement omitted.]

Endorsed on cover: Enter R. G. Sharpe. File No. 40,958. E. Washington, D. C. U. S. Term No. 418. Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Members of the Tax Commission of the State of Washington, appellants, vs. Silas Mason Company, Inc., Walsh Construction Company, Guy F. Atkinson, et al. Filed September 30, 1936. Term No. 418, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 418

HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, MEMBERS OF THE TAX COMMISSION OF THE STATE OF WASHINGTON,

Appellants,

VS.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER, AND ELMER L. KIER, COPARTNERS AS ATKINSON-KIER COMPANY, AND MASON-WALSH-ATKINSON-KIER COMPANY,

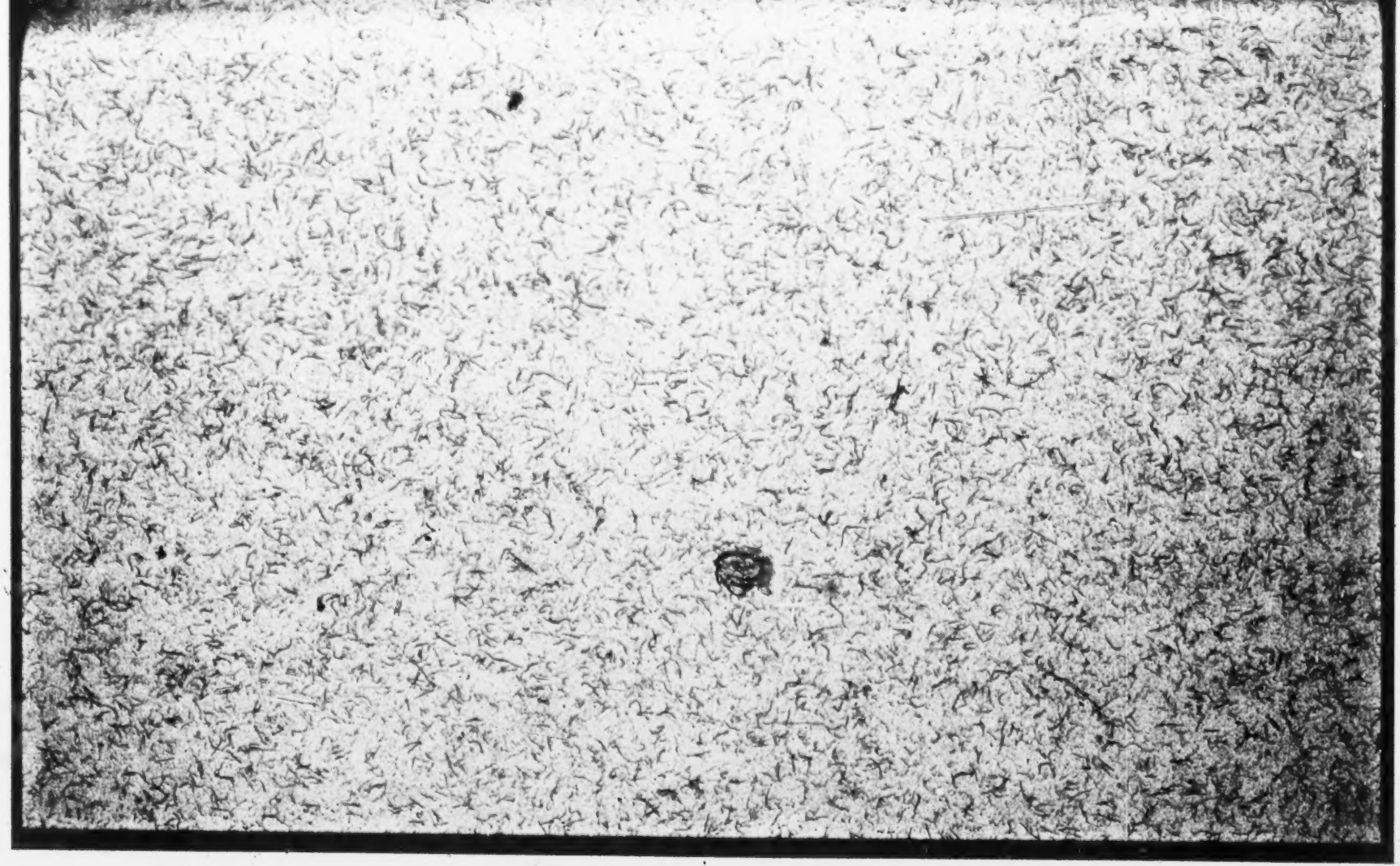
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANTS' MOTION TO ADVANCE CASE ON CALENDAR

G. W. HAMILTON AND R. G. SHARPE,
Attorneys for Appellants,
Office and Postoffice Address: Temple of Justice, Olympia, Wash.

GRAVES, KIZER AND GRAVES,
Attorneys for Appellees,
W. G. GRAVES AND B. H. KIZER,
Solicitors for Appellees.
Postoffice Address: Old National Bank Bldg., Spokane, Wash.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 418

HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, MEMBERS OF THE TAX COMMISSION OF THE STATE OF WASHINGTON,

Appellants,

VS.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER, AND ELMER L. KIER, COPARTNERS AS ATKINSON-KIER COMPANY, AND MASON-WALSH-ATKINSON-KIER COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANTS' MOTION TO ADVANCE CASE ON CALENDAR

Come now the appellants and move the Court for an order advancing the date of argument of the above appeal to the first available date after the record therein will have been printed and in the hands of both parties for a period of twenty-five days.

This motion is based upon the files and records in the appeal and upon the affidavit and stipulation hereto attached.

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Attorneys for Appellants.

SUPPORTING AFFIDAVIT

STATE OF WASHINGTON,
County of Thurston, } ss.

R. G. SHARPE, being first duly sworn, on oath, deposes and says: That affiant is one of the assistants of the Attorney General of the State of Washington, and as such is now, and at all times since its inception has been, one of the attorneys for appellants in the above appeal. That the decision of this Court on said appeal will be determinative of the validity of Title IV, Chapter 180, Sections 31 to 35, Laws of Washington of 1935, which imposes upon every person in the State of Washington a tax or excise for the privilege of using within said state any article of tangible personal property purchased at retail subsequent to April 30, 1935, equal to 2% of the purchase price thereof plus cost of transportation to place of use, with an off-set of any use or sales tax paid thereon either in the State of Washington or in any other state. That said revenue act was sustained by the supreme court of the State of Washington in the case of *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, as not violative of any provision of either the state or federal constitutions, and the tax imposed thereby has been in general collected since said decision, but that the decision of the divided three-judge court in the present case has cast a doubt upon the validity of said revenue measure to the extent that the collection of such tax is becoming increasingly difficult. That the State of Washington depends in large measure for the support of its public schools, its state emergency relief, and its other state expenses upon the revenue realized from said tax

measure and the companion tax measure, the 2% retail sales tax imposed by Title III of said Chapter 180, Laws of 1935. That the legislature of the State of Washington will meet in regular session on January 11th, 1937, to remain in session not to exceed sixty days thereafter, and in order that said legislature may make proper provision for the expenses of state government, it is a matter of great importance that the question of the validity of the tax involved in the present appeal be, if possible, determined by this court before the adjournment of said state legislature.

That the transcript of the record in said appeal is now on file with the clerk of this court, and the portions of the record to be printed have been duly designated by both parties thereto.

R. G. SHARPE

Subscribed and sworn to before me this 14th day of October, 1936.

JENNIE M. TATTERSALL
Notary Public in and for the State of Washington, residing at Olympia.

(Notarial Seal)

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties to the above entitled appeal that the date of argument of such appeal may be advanced to the first available date after the record in such appeal will have been printed and in the hands of both parties thereto for a period of twenty-five days.

Dated this 15th day of October, 1936.

G. W. HAMILTON AND R. G. SHARPE,
Attorneys for Appellants,

GRAVES, KIZER AND GRAVES,
Attorneys for Appellees,

W. G. GRAVES AND B. H. KIZER,
Solicitors for Appellees.

Due and timely service of the within motion by receipt of a true copy thereof, acknowledged this 15th day of October, 1936.

GRAVES, KIZER AND GRAVES,
Attorneys for Appellees,

W. G. GRAVES AND B. H. KIZER,
Solicitors for Appellees.

SEP 30 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 418

HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, MEMBERS OF THE TAX COMMISSION OF WASHINGTON,

Appellants,

vs.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

G. W. HAMILTON,
Attorney General of Washington.
R. G. SHARPE,
Assistant Attorney General of Washington.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 418

HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, MEMBERS OF THE TAX COMMISSION OF WASHINGTON,

Appellants (Defendants Below),

vs.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER, AND ELMER L. KIER, COPARTNERS AS ATKINSON-KIER COMPANY, AND MASON-WALSH-ATKINSON-KIER COMPANY,

Appellees, (Plaintiffs Below).

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellants, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

Section 266 of the Judicial Code as amended (Sec. 380, Title 28, U. S. C. A.) provides:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, • • • and unless a majority of said three judges shall concur in granting such application. • • • An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. • • •."

The Tax Commission of the State of Washington is an administrative board of the State of Washington (Sec. 1, *et seq.*, Ch. 280, p. 676, Laws of Washington of 1927), and is charged with the administration of Chapter 180, Laws of Washington of 1935, and the collection of all taxes imposed thereby. (Sec. 208, 0. 844, ch. 180, Laws of Wash. of 1935.)

B.

Statute of the State, the Validity of Which is Involved.

Title IV, Chapter 180, Laws of Washington of 1935 (Secs. 31-35, pp. 726-728, Ch. 180, Laws of Wash., 1935) was approved by the governor of the State on March 25, 1935 (Laws of 1935, p. 849), and since it contained an emergency clause (Laws of 1935, p. 849, Sec. 218), became effective upon such approval. (Const. of Washington, Art. II, Sec. 31). Said statute imposes upon every person in the State of Washington a tax or excise for the privilege of using within said State any article of tangible personal property purchased subsequent to April 30, 1935, equal to 2% of the purchase price thereof plus cost of transportation to place of use, with an off-set of any use or sales tax paid thereon either in the State of Washington or any other state.

C.

Date of Order Appealed From, and Date of Application for Appeal.

The date of entry of the order for an interlocutory injunction by the United States District Court for the Eastern District of Washington, Northern Division, sought to be reviewed was September 16th, 1936.

The date on which the application for appeal was presented and the appeal allowed was September 21st, 1936.

D.

Nature of the Case and Rulings Below.

On June 5, 1936, plaintiffs in the court below (appellees here), filed their complaint alleging that during the months of May and June, 1935, they purchased outside of Washington, caused to be shipped into Washington for use in that State and actually used in Washington a large amount

of tangible personal property by reason of the use of which by said plaintiffs, the defendant tax commissioners demanded of, and threatened to collect from plaintiffs by summary methods, the tax imposed by said Title IV, Chapter 180, Laws of Washington of 1935. Plaintiffs further alleged that said State statute and the tax thereby imposed were null and void as to plaintiffs, among other reasons, because it violates the commerce clause of the Federal constitution, and prayed in their complaint and in a separate motion for the issuance of an interlocutory injunction preventing the defendant tax commissioners from proceeding to collect the tax as demanded by them.

The District Judge thereupon assembled a three-judge court to hear said application as provided by Section 266 of the Judicial Code, and thereafter such proceedings were had that on September 16, 1936, an order was entered in said cause by said three-judge court adjudging that the provisions of said State statutes are null and void and that the tax imposed thereby is illegal and unenforceable as against plaintiffs (the appellees here), and granting an interlocutory injunction restraining the defendants (appellants here), both individually and as the Tax Commission of the State of Washington, during the pendency of said suit from enforcing or attempting to enforce the collection of said tax from the said plaintiffs or by the sale of their property.

From said order granting interlocutory injunction this appeal was taken by the defendants, members of the Tax Commission of the State of Washington (appellants here).

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of the express provisions of Section 266 of the Judicial Code.

G. W. Hamilton and
R. G. Sharpe,
Attorneys for Appellants.

EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

No. E 4473.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, Co-partners as ATKINSON-KIER COMPANY, and MASON-WALSH-ATKINSON-KIER COMPANY, *Plaintiffs*,

vs.

HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, *Members of the Tax Commission of the State of Washington, Defendants.*

Opinion.

July 14, 1936.

Messrs. Graves, Kizer & Graves, Spokane, Washington, Attorneys for the Plaintiffs.

G. W. Hamilton, Attorney General, State of Washington; R. G. Sharpe, Assistant Attorney General, State of Washington, both of Olympia, Washington, Attorneys for the defendants.

Before Haney, Circuit Judge, Webster and Cavanah, District Judges, as a Statutory Three-Judge Court.

CAVANAH, *District Judge:*

The United States, under an act of Congress, is engaged in the construction of the Grand Coulee Dam, on the Columbia River, for the purpose of controlling floods, improving navigation, providing for the storage and delivery of stored water for the reclamation of public land, and generation of electrical energy. After receiving bids for the construction of the dam, which is one of unusual

magnitude, a contract was, on July 16, 1934, entered into by the United States and the plaintiffs (other than the Mason-Walsh-Atkinson-Kier Company) whereby plaintiffs named, agreed to furnish some of the materials and to perform work required for the construction of the naked dam and power plant in accordance with specifications of the Columbia Basin Project. Consideration of the contract was that plaintiffs were to receive $29,339,301.50 for the performance of the work and such materials as were to be supplied by them, and such additional amount caused by changes to be made in the plans and specifications by the United States, which has increased the amount of the agreed contract price by over $7,000,000.00.

The plaintiffs are non-residents of the State of Washington, and have no other business and are not engaged in other operations in that State, than the construction of the dam, and are within the State solely for the purpose of discharging their contract obligations with the United States.

The defendants constitute the tax commission of the State of Washington and as such are demanding payment of and endeavoring to collect the tax which is the subject of the controversy.

The legislature of the State of Washington, at the 1935 Session of the Legislature enacted a general revenue act, Chapter 180, Session Laws of Washington, 1935. By Title 3 of that Act it provided for a tax on retail sales within the State of Washington, and by Title 4, for what is called a compensating tax, which is, in effect, a tax upon purchases of materials made by persons within the State of Washington, and in other States of the Union.

Claiming to act under authority of the act, the Tax Commission has adopted a number of rules and regulations relating to the various taxes provided by the act, and respecting Title 4, the Tax Commission has by rule provided that the nature of the tax is a compensating tax and so enacted to supplement the retail sales tax, by imposing a like tax for the privilege of using within the State tangible personal property purchased at retail, subsequent to April 30, 1935, and with respect to which property, neither the sales tax nor the use tax of 2% has been imposed by the

State of Washington or any other State, and the rules further provide that "the primary purpose of the compensating tax is to protect the merchants of Washington from discrimination arising by reason of the inability of the State, because of the Federal constitution, to impose a tax upon sales made to residents of this State by competitive merchants in other States", Rule 178, page 104.

Having then in mind the facts appearing in the complaint and affidavits presented and the provisions of the act, we find that prior to the enactment of the act, plaintiffs had purchased in other states than Washington, heavy equipment and machinery which were necessary for the construction of the dam under their contract. After considering the character of the work done, the frequent repairs and replacement of machinery required, which cannot be obtained within the state of Washington, but must be purchased in other states, during the months of May and June 1935, plaintiffs purchased within the United States and outside of the state of Washington, equipment and machinery and other articles used in the construction of the dam, the purchase price of which was $899,390.91 plus transportation cost $21,798.43.

In the light of the facts, the requirements of the act and the regulations of the commission, plaintiffs, by their complaint and affidavits assert that as against them, the provisions of Title 4, chapter 180 of the laws of Washington are illegal and unenforcible and that such tax be removed as a cloud upon the title of their personal property purchased by them outside of the state of Washington and that defendants be enjoined and perpetually restrained from enforcing and attempting to enforce the collection of such tax from them or by the sale of their property.

The reasons urged by plaintiffs as to the illegality of the tax as against them are:

First: That the construction of the dam upon which plaintiffs are engaged under their contract with the United States is a governmental work in the prosecution of which the executive department of the United States is exercising a franchise granted by Congress to construct a dam across the Columbia River, a navigable stream, to the end that

navigation may be improved, and irrigation of public lands and flood control be effected and that as the United States is in the exercise of the franchise and the prosecution of the Governmental work the plaintiffs are employed as agencies and instrumentalities of the United States, and their property is exempt from the imposition of the tax.

We think that under the record before us this contention is not well founded, when we are confronted with the facts that the plaintiffs are nothing more than independent contractors performing work and furnishing materials for a definite price which the Government has agreed to pay and they have agreed to accept under the contract obtained by competitive bids. Their relations to the government are contractual, they do not exercise governmental functions, as they only undertook to construct the dam according to plans and specifications, adopted by the government, for a profit to be made in so complying. In no way is the government affected by the fact that they pay or do not pay taxes or that they are a government instrumentality. The cases relied upon by plaintiffs are not applicable to the facts here for we find that most of them are based upon facts where the parties claiming exemption were either agents of the government or engaged as employees or officers of the government in the exercise of governmental functions. The authorities seem to agree that independent contractors with the government for gain cannot claim immunity from taxation by reason of furnishing material or labor to the United States. Susquehanna Power Company *v.* State Tax Commission or Maryland 283 U. S. 291; Broad River Power Co., *v.* Query *et al.*, 288 U. S. 178; Trinityfarm Construction Co., *v.* Grosjean, Supervisor of Public Accounts of Louisiana, 291 U. S. 466; Six Cos., Inc., *v.* DeVinney, County Assessor 2 Fed. Supp. 693; Nevada-California Power Co., *v.* Ullom *et al.*, 3 Fed. Supp. 935; *Ronier* National Bank *v.* Henneford 182 Wash. 159-163; General Construction Co., *v.* Fisher 149 Ore. 84; 39 Pac. (2d) 358-361. Citations of similar import might be multiplied many times but those cited are enough to demonstrate beyond peradventure that under the record plaintiffs are not so situated as to urge that they are an agency or instrumentality of

the United States exercising governmental functions in order to bring them under the rule of exemption of taxes.

Second: We come then to the real question in the case as to the constitutionality of the tax as against the plaintiffs. It is urged that the tax is levied against articles purchased outside of the state of Washington by plaintiffs because in the light of its history and present setting it is a deliberate attempt to tax articles purchased and brought in from another state, which is discriminating in its incidence against the articles because of their origin in another state. The Commerce Clause of the federal constitution is invoked as it is asserted that the act attempts to regulate commerce between states, the power of which is in Congress. The provisions of the act in question, which are pertinent to our inquiry are section 31; "There is hereby levied and there shall be collected from every person in this state a tax or exercise for the privilege of using within this state any article of tangible personal property purchased subsequent to April 30, 1935. Such tax shall be levied and collected in an amount equal to the purchase price paid by the taxpayer multiplied by the rate of 2%." Section 33; "If any article of tangible personal property has already been subjected to a tax by this or any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed." Section 35 (a); "The term 'purchase price' shall mean the consideration paid or given or contracted to be paid or given by any person to the seller of an article of tangible personal property for the article purchased. The term shall include, in addition to the consideration paid or given or contracted to be paid or given, the actual cost of transportation from the place where the article was purchased to the person using the same in this state."

The terms of the act are that the tax is levied and collected on any article of tangible personal property in an amount equal to the purchase price paid by the taxpayer multiplied by the rate of 2%, whether the article is purchased within or without the state of Washington, and is

termed a compensating tax. It levys an excise tax for the privilege of using within the state, any article of personal property purchased subsequent to April 30, 1935. It is obvious from the act and the provisions of the exceptions to its operations that it was intended to discriminate against articles brought in from other states in order to remove any competition with the merchants of the state of Washington. This appears by section 32 (c); 33 and 35 (a) of the act, and in its practical operation when applied to those states other than the state of Washington who have, and those who do not have a sales tax. It is apparent that the discrimination appears, as the complaint discloses that twenty-three states of the Union have a sales tax and as an illustration of the practical operation of the Washington tax we find that Idaho has a 2% sales tax, Oregon has no sales or use tax. One purchasing property in Oregon cannot bring it into Washington unless he pays a 2% tax on the purchase price, plus transportation costs, while one who purchases property in Idaho destined to be used in Washington may bring the property into Washington and put it to use without paying the tax. A further illustration is; that the state of Illinois has a tax like Washington while Indiana has a tax of 1%, therefore, articles purchased in Illinois may be brought into and used in Washington tax free, while the same articles purchased in Indiana must pay a tax of 1%, the difference between the tax of the two states, plus the cost of transportation from Indiana to Washington. The discrimination more forcibly appears where the defendants under section 35 (a) have added $21,798.43 to the purchase price of the articles as transportation costs in other states which are subject to tax under the Washington act. Under the language of the act and the interpretation given to it by the Washington Tax Commission, both the legislature and the commission had primarily in mind removing from the shoulders of the merchants of Washington competitive disadvantage occasioned by the Washington sales tax and the absence of such a tax in other states. This thought is borne out, as far as the commission is concerned, who is intrusted with the enforcement of the law, where they have said in regulation

178: "Statement of the nature of the tax.—The Compensating tax (Title IV) was enacted to supplement the retail sales tax by imposing a like tax for privilege of using within this state tangible personal property purchased at retail subsequent to April 30, 1935 (the effective date of the retail sales tax law) and in respect to which property neither a sales tax nor a use tax equal to 2% has been imposed by this or any other state."

"The primary purpose of the compensating tax is to protect the merchants of Washington from discrimination arising by reason of the inability of the state, because of the federal constitution, to impose a tax upon sales made to residents of this state by competitive merchants in other states."

When the validity of a state statute is challenged on the ground that it is repugnant to the Commerce Clause we are not bound by the legislative declaration of purposes because if the statute in its practical operation directly burdens or destroys interstate commerce, the act must fall. We must look to the practical consideration of the established course of business in determining what is interstate commerce; Shafer *v.* Farmers Grain Co., 268 U. S. 189; Foster Packing Company *v.* Hoydel, 278 U. S. 1-10; Baldwin *v.* Seelig, *Supra.* The courts are only concerned "with its practical operation, not its definition or the precise form of descriptive words which may be applied to it"; Lawrence et al., *v.* State Tax Commission of Mississippi, 286 U. S. 276. If it bears upon commerce among the states as to amount to a regulation in a relatively immediate way, it cannot be upheld by name or form.

If the nature and effect of the tax levied by the act discriminates against articles purchased and brought in from other states and because of their origin in another state it is an attempt to regulate and a burden upon interstate commerce and would be inconsistent with the freedom of trade which congress only has the power to regulate as between the states. It would seem unnecessary to cite authorities in support of this well known construction of the commerce clause of the constitution, but see Hart Refineries *v.* Harmon, 278 U. S. 499; Baldwin *v.* Seelig, 294 U. S. 511. With these principles in mind and applying them

to the record it is apparent that the tax is discriminating in its incidence against articles because of their origin in other states and that the Washington act was framed for the purpose of suppressing competition from without the state. Plaintiff had a right to go into other states without first obtaining the leave of the state of Washington for all legitimate purposes of commerce and the litigated statute which lays a burden on the exercise of that privilege is void as against the plaintiff under the commerce clause. Dahnke Walker Milling Company *v.* Bondurant, 257 U. S. 282; Lemke, as Attorney General of the state of North Dakota et al. *v.* Farmers Grain Co., 258 U. S. 50; Asher et al. *v.* Engels, 13 Fed. Supp. 655.

The argument is pressed that the state may lawfully tax the "use" of tangible personal property brought in from other states without a violation of the commerce clause and the defendants rely principally upon the decision of the supreme court of the state of Washington where this tax was sustained by a majority opinion as against the contention that it offends the commerce clause, Vancouver Oil Co. *v.* Henneford, 183 Wash. 317, 49 Pac. (2d) 14. In that decision the state supreme court seemed to have based its decision upon the sole thought that the goods affected had come to rest within the state of Washington and not as we view it, whether the tax was discriminating in its incidence against the goods because of their origin in another state. If it is levied without regard to origin and the goods had come to rest in the state of Washington, it would be neither a regulation nor a burden of interstate commerce, but that is not the case under this act and the record before us, for as has been said, it appears clear that the act was intended to levy a tax on articles purchased outside of the state of Washington, because of their origin, and by so doing it discriminates against such articles.

Tested by these considerations we have reached the conclusion that the litigated act is violative of the commerce clause of the federal constitution as against the plaintiffs and that the motion to dismiss is overruled, and that an interlocutory injunction issue as prayed for in the complaint.

Endorsed: Filed August 3, 1936. A. A. LaFramboise, Clerk.

(SILAS MASON COMPANY, INC., *et al.* v. HENNEFORD *et al.*, No. E. 4473.)

HANEY, *Circuit Judge*, Dissenting:

The tax in question is imposed on "the privilege of using" in Washington, articles of personal property, and is a "use tax." The validity of such taxes is not questioned except insofar as it may be said to conflict with the commerce clause of the federal constitution.

I cannot agree that the tax here laid, discriminates against commodities because of their origin in another state. The statute (Ch. 180, Sec. 31, Laws of Washington, 1935), levies the tax on the use of "any article of tangible personal property," and makes no distinction between articles, either because of the place of their origin or place of purchase. It is applicable to articles originating or purchased within the state of Washington as well as to those originating or purchased elsewhere.

The following section (Sec. 32 (c)), exempts from taxation "the use of any article of tangible personal property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title whether under the laws of this state or of some other state of the United States." Section 33 provides:

> "If any article of tangible personal property has already been subjected to a tax by this or any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed."

The effect of these two latter sections together with Sec. 31 is to tax the use of all personal property, the sale or use of which has not already been taxed by any state, including Washington, to the extent of two per cent of its purchase price. I see no discrimination in such a tax. As pointed out by defendants the articles exempt under the Washington sales tax law (See Sec. 19, Ch. 180, Laws 1935), even

originating in Washington are subject to the use tax, See Sec. 32, *supra.*

As to the universal applicability of the "use" tax, we might fairly consider the result had the Governor of Washington vetoed the sales tax (Title III, Ch. 180, Laws of 1935). Under such circumstances it seems to me conclusive that the "use" tax provided for in Sec. 31, *supra,* would have applied to the use of all tangible personal property, irrespective of its place of origin.

Plaintiffs make no contention that the tax, as applied to them is a tax on an instrumentality of interstate commerce, but contend that the tax is imposed directly upon interstate commerce, because in effect the tax is one on the goods themselves.

I am unable to agree with that argument, because the tax is on the "use" of the articles, not on the articles themselves. If the tax was one on the "use" of the articles while in interstate commerce, it might then be invalid, but there is no pleading nor proof in this case which authorizes such a conclusion. In fact, under the pleadings, it is shown that the articles were in interstate commerce until they reached their destination, at which point, the articles were intended to be used in constructing the dam. When that destination was reached, the character of the goods as "interstate commerce" ended. Bacon *v.* Illinois, 227 U. S. 504. By reason of the presumption that a statute is valid, we must presume that the tax attached to the use of the goods after their movement in interstate commerce had ended.

I therefore believe the bill should be dismissed.

Endorsed: Filed August 3, 1936, A. A. LaFramboise, Clerk.

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To avoid confusion, the appellees (plaintiffs below) will be referred to herein as "plaintiffs," and the appellants (defendants below) as "defendants."

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The United States, under an Act of Congress, is engaged in the construction of the Grand Coulee Dam at a point in the State of Washington on the Columbia River, for the purpose, as the Act declares, of controlling floods, improving navigation, providing for the storage and delivery of stored water for the reclamation of public land, and the generation of electrical energy. After receiving bids for the construction of the dam, the United States, in July, 1934, entered into a contract with plaintiffs other than the Mason-Walsh-Atkinson-Kier Company whereby said plaintiffs agreed to furnish some of the materials and to perform work required for the construction of the naked dam and power plant in accordance with specifications of the Columbia Basin Project. The consideration of the contract was that said plaintiffs were to receive $29,339,301.50 for the performance of the work and such materials as were to be supplied by them, and such additional amount caused by changes to be made by the United States in the plans and specifications, which changes have increased the amount of the agreed contract price by over $7,000,000. (R. 23)

The plaintiffs are non-residents of the State of Washington, and are engaged in no business or operations in the State of Washington other than the construction of said dam. (R. 23)

The Washington legislature, at its 1935 session, enacted a general revenue law, Chapter 180, Session Laws of Washington, 1935. By Title III, such Act imposes on the purchaser a tax measured by 2% of the purchase price on all retail sales within the State subsequent to April 30, 1935, of tangible personal property other than newspapers, motor vehicle fuel (otherwise taxed), sales on re-

lief vouchers, and bread, eggs, raw fruits and vegetables, fresh milk, and certain milk products. (ch. 180, secs. 16-30, Laws of Wash., 1935)

Title IV of said 1935 Revenue Act imposes what is described as a "compensating tax" for the privilege of using within said State any article of tangible personal property purchased at retail subsequent to April 30, 1935, and measured by 2% of the purchase price and transportation cost to place of use, with an offset of any sales or use tax paid in connection therewith, either within or without the State. The tax does not apply: (1) to the use of property brought into the state by a nonresident for his use and enjoyment while within the state; nor (2) to the use of property purchased during any calendar month, the total purchase price of which is less than $20.00.

The pertinent parts of said Revenue Act are set forth in "Appendix A" (*post*, pp. 37-40).

Prior to the enactment of said 1935 Revenue Act, plaintiffs had purchased in states other than Washington, heavy machinery and equipment necessary for the construction of the dam, and during May and June, 1935, purchased in various states of the Union other than Washington, equipment, machinery and other articles which were shipped into Washington and used in the construction of the dam, the purchase price of which was $899,390.91, and the transportation cost, $21,798.43. (R. 24)

The defendants who constitute the tax commission of the State of Washington, charged with the duty of collecting the various taxes imposed by the 1935 Revenue

Act, demanded payment and threatened collection of the compensating tax from plaintiffs by reason of the use by them of said tangible personal property so purchased by them in other states in May and June, 1935. Plaintiffs instituted this suit in the United States district court for the Eastern District of Washington, Northern Division, to remove the cloud thereof from their personal property, and to enjoin the defendant tax commissioners from enforcing the collection of said tax from plaintiffs (R. 1-18) on the grounds (1) that it was extra-territorial in its operation in that the dam area belonged to, and was under the jurisdiction of the United States; (2) that in constructing the dam plaintiffs were agencies and instrumentalities of the federal government and were therefore exempt from said tax, and (3) that as applied to property purchased in other states the Compensating Tax Act constituted an unlawful burden on interstate commerce in violation of the commerce clause of the federal constitution. (R. 14-17)

Plaintiffs' application for an interlocutory injunction was heard by a statutory three-judge court under section 266 of the Judicial Code. (R. 20) At the interlocutory hearing plaintiffs expressly disclaimed any right to an injunction *pendente lite* on the first ground urged, namely, that the dam area belonged to the United States. (R. 35)

As to the second objection to the tax, the court held that as applied to plaintiffs the Act was not void as imposing a tax on a federal governmental agency since plaintiffs were independent contractors (R. 25-6), but as to the third objection raised, the court, by a two to one

decison, held the Compensating Tax Act void as violative of the commerce clause. (R. 26-30)

The court having made findings of fact and conclusions of law (R. 33-36) and entered its order adjudging the tax void and directing the issuance of an interlocutory injunction restraining its collection by the defendant tax commissioners (R. 38-39), defendants have appealed. (R. 39)

So far as appellants know, the decision of the trial court has not been officially reported, but is found in volume 15 Federal Supplement, pages 958-963.

SPECIFICATIONS OF ERROR

I

The court erred in adjudging that said Compensating Tax constitutes an unlawful burden on interstate commerce in violation of the commerce clause of the federal constitution. (R. 26-30, 42)

II

The court erred in finding and concluding that said Compensating Tax was intended to and does unlawfully discriminate against articles because of their origin in states other than Washington. (R. 26-30, 41)

ARGUMENT

Specifications I and II

Both specifications present the same inquiry, namely, does the Washington Compensating Tax Act violate the Commerce Clause? Hence, they will be discussed together.

(a) The Compensating Tax and Retail Sales Tax are imposed by the same Act, and must be construed together to discover whether either or both amount to an unlawful discrimination against interstate commerce.

In *Gregg Dyeing Co. v. Query*, 166 S. C. 117, 164 S. E. 588, it appeared that by one statute of South Carolina a tax on gasoline of 6 cents per gallon was imposed on all distributors, while another statute imposed a tax of the same amount on gasoline imported into the state and stored for use and consumption. The latter act was attacked by a dyeing establishment bringing gasoline into the state for its own use in its manufacturing processes, as violative of the commerce clause. In sustaining the tax the state court held that the two Gasoline Tax Acts should be taken together and construed in *pari materia*, and as so construed, did not discriminate against interstate commerce.

Your Honors affirmed the above decision (*Gregg Dyeing Co. v. Query*, 286 U. S. 472), saying in part (479-480):

"The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the State imposing a tax upon the sale and use of gasoline within the State. The state court said that the Act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been

paid under other statutes. By the kindred Acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the Act assailed. To stand the test of constitutionality, they say, the Act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power. When the Supreme Court of the State has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves. *Hebert v. Louisiana*, 272 U. S. 312, 317. See *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 73.''

In sustaining the Compensating Tax the State supreme court, while not expressly so holding, in effect treated the sales tax and compensating tax provisions as complementary and part of a single general plan of taxation. See *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 319-320. It could scarcely have done otherwise, since the two taxes are imposed by the same revenue measure. See *Hinson v. Lott*, 75 U. S. 148, 152-3, where a state tax on liquors brought into the state for sale was sustained because, by other sections of the same act, a like tax, though collectible in a different mode, was imposed on liquors manufactured within the State.

(b) The commerce clause is not violated by imposition of a non-discriminatory property tax on subjects of interstate commerce which have come to rest within the state. This court will determine for itself the true nature of a tax. In its practical operation, the Washington compensating tax is no more offensive to the commerce clause than is an ordinary property tax.

The items of personal property upon the use of which the compensating tax is here sought to be imposed, have become commingled with the general mass of property of the state and lost their distinctive character as articles of interstate commerce. The complaint alleges:

"All the articles so purchased were purchased to be used, and were brought into the State of Washington and used, in and about and for the purposes of the construction of the Grand Coulee Dam under plaintiffs' aforesaid contract with the United States." (R. 11)

(b-1) Commerce clause not violated by imposition of non-discriminatory property tax on subjects of interstate commerce coming to rest within State.

As soon as goods are brought into a state and become part of its general mass of property, they become liable to state taxation in the same manner as other property of similar character.

Brown v. Houston, 114 U. S. 622;
Emert v. Missouri, 156 U. S. 296;
Darnell & Son Co. v. Memphis, 208 U. S. 113;
Minnesota v. Blasius, 290 U. S. 1;
Trinityfarm Const. Co. v. Grosjean, 291 U. S. 466, 472;
Six Cos. v. De Vinney, 2 Fed. Supp. 693, 699.

(b-2) This court will determine for itself the true nature of a contested tax.

Where a federal question is involved the Supreme Court is not bound by the label attached to a tax by the legislature, or by the courts or administrative officers of

the state, but will determine for itself the true nature of the tax by ascertaining its operation and effect.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Mugler v. Kansas, 123 U. S. 623, 661;
Galveston, Harrisburg & Ry. Co. v. Texas, 210 U. S. 217, 227;
Educational Films Corp. v. Ward, 282 U. S. 379, 387;
Lawrence v. State Tax Commission, 286 U. S. 276, 279-280;
Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113, 119.

And it goes without saying, of course, that it is no less the Court's duty to look to the true substance of the tax for the purpose of sustaining it, than for the purpose of condemning it. To quote from *Lawrence v. State Tax Commission*, 286 U. S. 276, 280, sustaining an income tax act as against the claim that it offended the due process clause:

"The present tax has been defined by the Supreme Court of Mississippi as an excise and not a property tax, • • • but in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it."

(b-3) Construed together, the retail sales tax and compensating tax are no more burdensome to interstate commerce than is the ordinary property tax.

It is apparent, we submit, that in their effect upon interstate commerce, the Washington retail sales tax and compensating tax have all the essential attributes of a property tax.

A property tax is ordinarily fixed at a certain rate on the market value of the property. The sales and com-

pensating taxes are measured by a constant rate—two per cent—applied to the *best evidence of the property's value*, namely, its purchase price new. The sales tax is payable by the purchaser (Sec. 21, *post*, p. 38), the compensating tax by the one first using the purchased article within the state. (Sec. 34, *post*, p. 38.) Both are uniform as to application, since, with unimportant exceptions, they apply uniformly to all articles purchased after April 30, 1935.

That the sales or compensating tax is collected but once, while property taxes are imposed periodically, seems immaterial. If personalty purchased locally or purchased elsewhere and used within the state, is still in Washington on the assessment date, it is subject either to a personal property tax, or, if incorporated in fixtures, to a real property tax. Thus, in practical effect, all tangible personal property used in Washington and purchased after April 30, 1935, is subject to a sales or use tax imposed but once, and measured by 2% of its value, plus the ordinary, periodically-imposed *ad valorem* property tax.

That the effect on interstate commerce of the compensating and retail sales taxes, taken together, is no more onerous than the exaction of a corresponding property tax, becomes at once apparent when we compare the effect of the one with the effect of the other. Let us assume that, instead of the offending tax, the state of Washington, in addition to its other property taxes assessed annually, undertook to levy an *ad valorem* tax at a uniform rate upon all tangible personal property purchased after a certain time, and having its actual situs within the state. Such a tax, being both in name and effect, a true property

tax, could not be held violative of the commerce clause, yet in what way would such a tax be less burdensome on interstate commerce, than the compensating and sales taxes now before us? Obviously the tax burden is precisely the same, whether the exaction be conditioned on the purchase or use of property or on mere ownership.

In *Brown v. Maryland*, 12 Wheat. 419, a tax on the occupation of an importer was held a tax on imports obnoxious to the commerce clause, the court saying (p. 444):

"All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

And in *Cook v. Pennsylvania*, 97 U. S. 566, a tax on the amount of an auctioneer's sales was declared a tax on the goods sold.

In *Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288, a tax sought to be imposed by Kentucky of 50 cents a gallon on whisky either withdrawn from bond within the state or transferred in bond from the state to points elsewhere, although described as a license tax, was held to be essentially a property tax.

In sustaining the Washington occupational tax measured by a percentage of the receipts from local business of interstate carriers and telephone companies, Your Honors said in *Pacific Tel. & Tel. Co. v. Tax Commission*, 297 U. S. 403, 413:

"In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an *ad valorem* property tax upon tangible property used exclusively in such business."

True, in *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, the state court held the compensating tax not to be a property tax within the contemplation of the state con-

stitution requiring uniformity of property taxation, and in *Morrow v. Henneford*, 182 Wash. 625, held to the same effect with respect to the retail sales tax. But as above noted, in passing upon a federal question, this court is not bound by the particular name placed upon a contested tax by the state courts,—and for this reason:

The Supreme Court's conclusion as to whether a given state tax offends the commerce clause must, of necessity, be of uniform application in each of the several states. Let us suppose this identical compensating tax measure appeared on the statute books of each of two states. Would this court adjudge invalid as violative of the commerce clause the statute of the one state because its courts had declared such tax to be an excise, and sustain the identical statute of the other because called by the courts of that state, a property tax? Obviously not. The effect of a state tax on interstate commerce cannot, we submit, be influenced by the particular label placed upon such tax by the local courts. The same law must be as inoffensive or obnoxious to the commerce clause in California as in Oregon.

The identical question arose in *Eastern Air Transport Inc. v. South Carolina Tax Commission*, 52 Fed. (2d) 457 (affirmed: 285 U. S. 147, 152), where, although a sales tax had been held by the state supreme court not be a property tax within the meaning of the state constitution, the three-judge district court nevertheless held that, for the purpose of determining questions arising under the federal constitution, the exaction must be treated as a tax on property sold. To quote:

"We attach no importance to the fact that the tax is described in the statute as a privilege or license tax;

for, where such tax is measured by sales, it is in effect a sales tax, whatever it may be called. *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 222, 48 S. Ct. 451, 72 L. Ed. 857, 56 A. L. R. 583. And, although not a property tax within the meaning of the South Carolina Constitution, but an excise tax *(Gregg Dyeing Co v. Tax Commission*, 166 S. C. 117, 164 S. E. 588), it must be treated as in effect a tax upon the property sold for determining questions arising under the federal constitution. *Kehrer v. Stewart*, 197 U. S. 60, 25 S. Ct. 403, 49 L. Ed. 663; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Brown v. Maryland*, 12 Wheat. 425, 6 L. Ed. 678." (Books and pages of South Carolina case supplied)

And in affirming the decree, Your Honors said:

"The appellant emphasizes the fact that the tax has been construed by the Supreme Court of the State to be an excise tax and not a property tax. *Gregg Dyeing Co. v. Query*, 166 S. C. 117; 164 S. E. 588, decided April 13, 1931. So far as the present question is concerned, the distinction is not important. If such a license tax for the privilege of making sales within the state were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the State and hence subject to the State's authority to tax, although the property might actually be used in interstate commerce. 'It is elementary,' said the Court in *New Jersey Telephone Co. v. Tax Board*, 280 U. S. 338, 346, 'that a state may tax property used to carry on interstate commerce.'" *Eastern Air Transport v. Tax Commission*, 285 U. S. 147, 151-2.

There as here, it will be noted, the state supreme court had held the offending exaction not to be a property tax within the meaning of the state constitutional provision requiring uniformity of taxation, yet it was held that the analogy of the offending exaction to a property tax should be recognized in determining whether it unlawfully burdened interstate commerce.

(b-4) Compensating tax as a lieu tax.

In so far as it affects interstate commerce, the compensating tax may be viewed as a property tax for the further reason that it is in effect a tax imposed, partially at least, in lieu of property taxes. (*U. S. Express Co. v. Minnesota*, 223 U. S. 335; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450; *Pullman Co. v. Richardson*, 261 U. S. 330.) By initiative measures, the Washington voters, in November, 1932, and again, in November, 1934, limited *ad valorem* property taxation to 40 mills of assessed valuation (50% of the actual value) (ch. 4, Laws of Wash. 1933; ch. 2, Laws of Wash. 1935). While greatly reducing ordinary property taxes, these initiative measures made it necessary that the legislature find other sources of revenue (*State v. N. P. Ry. Co.*, 183 Wash. 33, 42-3). The result was the enactment of the 1935 Revenue Act (ch. 180, Laws of Wash. 1935).

Now if, as held in the three cases first above cited, a lieu tax (itself a property tax), may be measured by gross revenue (not itself a proper measure of property values; see *Johnson v. Wells Fargo & Co.*, 239 U. S. 234), surely a tax imposed in part in lieu of property taxes, of uniform application and measured by a uniform rate applied to the purchase price of all tangible personal property purchased or used within the state, should, as regards its effect on interstate commerce, be likewise viewed as a property tax.

(b-5) Placing realty and personalty in separate classes for taxation purposes, does not deny equal protection or due process.

Should it be argued that, viewed as a property tax, the sales and compensating tax measures impose a greater tax burden on personalty than upon real estate,

may we observe that the fourteenth amendment does not prevent state taxation of real estate and personal property at different rates.

"The amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property." *Home Ins. Co. v. New York*, 134 U. S. 594, 606; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 352.

"It is the usual course in tax laws to treat personal property as one class and real estate as another, and it has never been supposed that such classification created an illegal discrimination, because there might be some persons who owned only personal property, and others who owned property of both classes." *Thomas v. Gay*, 169 U. S. 264, 281.

And see Vol. 4 Encyc. U. S. Sup. Crt. Rep., pp. 393 *et seq.*, and supplement.

(c) Viewed as an excise, the compensating tax is not violative of the commerce clause.

In defense of plaintiffs' contention that the compensating tax offends the commerce clause, we cannot, we believe, furnish a more convincing brief than that contained in the following excerpt from the state supreme court's opinion in *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 321-323, wherein the tax was attacked by the owner of tangible personal property purchased in Oregon subsequent to May 1, 1935, and brought into and used in Washington:

"With reference to the commerce clause of the Federal constitution, it is well settled, of course, that the state, through its legislature, has no power to restrict or regulate interstate commerce, or to impose a tax upon an article which would place a direct burden upon such commerce. A state tax, however, on merchandise brought

into this state from another state, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful, providing the tax does not work a discrimination against merchandise because of its origin in another state.

"In *Sonneborn Bros. v. Cureton,* 262 U. S. 506, 43 S. Ct. 643, it is said:

" 'A state tax upon merchandise brought in from another state or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another state.'

"In *Bowman v. Continental Oil Co.,* 256 U. S. 642, 41 S. Ct. 606, with reference to a state law which imposed an excise tax of two cents for each gallon of gasoline sold or used, it is said:

" 'With the excise tax as imposed upon the use of gasoline by plaintiff at its distributing stations, in the operation of its automobile tank wagons and otherwise, we have no difficulty. Manifestly, gasoline thus used has passed beyond interstate commerce, and the tax can be imposed upon its use, as well as upon the sale of the same commodity in domestic trade, without infringing plaintiff's commercial rights under the Federal Constitution.'

"In the case of *Gregg Dyeing Co. v. Query,* 286 U. S. 472, 52 S. Ct. 631, 84 A. L. R. 831, the court had before it a statute of the state of South Carolina, which provided for a tax upon gasoline brought from another state, to be used and consumed in that state, and the law was sustained. Speaking with reference thereto, it was said:

" 'It imposes an exaction with respect to gasoline purchased in other states and brought into South Carolina and there placed by appellants in storage for future use within the state. By the terms of the Act, as construed by the state court and applied to these appellants, interstate commerce in relation to the subject of the tax has ended. The gasoline has come to rest within the state, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the state has the authority "to tax the products or their storage or sale." *Texas Company v. Brown,* 258 U. S. 466, 478; *Sonneborn Bros. v. Cure-*

ton, 262 U. S. 506, 519, 520; *Hart Refineries v. Harmon*, 278 U. S. 499, 501, 502. Not only may local sales of gasoline thus brought into the state be taxed, but its use as well. This was specifically determined in *Bowman v. Continental Oil Co.*, 256 U. S. 642, 648, 649. See *Hart Refineries v. Harmon, supra; Breece Lumber Co. v. Asplund*, 283 U. S. 788. There is an exception in the case of a tax directly on use in interstate commerce, as on use in interstate transportation. *Helson v. Kentucky*, 279 U. S. 245, 252; *Eastern Air Transport v. South Carolina Tax Comm.*, 285 U. S. 147. In view of these well-established principles, we find no ground for concluding that the state could not impose the tax with respect to the gasoline of appellants which was kept within the state for use in their local enterprises.'

"Between that case and the case now before us, there does not appear to us to be any substantial distinction. The controlling underlying principle is the same. There, the gasoline came to rest within the state and was being held for use or sale. Here, the property, which was purchased in Portland, Oregon, had been delivered to the appellant in this state for use in its business, and its interstate character had ceased."

To the authorities cited by the state supreme court, may we add the following:

Hart Refineries v. Harmon, 278 U. S. 499;
Texas Co. v. Brown, 258 U. S. 466, 478;
Hinson v. Lott, 75 U. S. 148;
Breece Lumber Co. v. Asplund, 34 N. M. 643, 287 Pac. 699 (Affirmed: 283 U. S. 788);
Sheip & Co. v. Amos, 100 Fla. 863, 130 So. 699;
State ex rel. People Motorbus Co. v. Blain, 332 Mo. 582, 58 S. W. (2d) 975;
Foster & Creighton v. Graham, 154 Tenn. 412, 285 S. W. 570.

In *Breece Lumber Co. v. Asplund*, 34 N. M. 643, 287 Pac. 699, the state court sustained a gallonage tax on the "use" of gasoline brought into the state by a logging company and used in its logging operations. The judg-

ment was affirmed on authority of *Bowman v. Continental Oil Co.*, 256 U. S. 642, 648, 649 (see 283 U. S. 788).

In *Hart Refineries v. Harmon*, 278 U. S. 499, it was contended that a state law taxing the sale of gasoline brought into the state was unlawfully discriminatory because the "use" of imported gasoline was not also taxed. While holding that the tax was not unduly discriminatory for the reason urged, Your Honors held that the state might have lawfully taxed the *use* as well as the sale of gasoline imported into the state and which had come to rest there, provided there was no discrimination against the commodity because of its origin in another state. After calling attention to a Montana supreme court case apparently holding that a tax upon products shipped into the state for consumption only would be a burden on interstate commerce, this Court said (278 U. S. 501-2):

"This holding, as it was applied to the contention in the present case, seems to have been the result of a too literal reading of *Sonneborn Bros. v. Cureton*, 262 U. S. 506, which was cited as authority. In that case this court, upon a full review of the earlier cases, held that when a commodity shipped from another state had come to rest as a part of the stock in trade of the dealer, the interstate transportation was at an end, and, whether in the original packages or not, a state tax upon the commodity, either as property or upon its sale in the state, if laid on the commodity generally without regard to its origin, would not constitute a burden upon or be a regulation of interstate commerce of which the commodity had been the subject. But there is nothing in the opinion to suggest that the taxing power of the state is limited to the two kinds of taxes mentioned. Interstate transportation having ended, the taxing power of the state in respect of the commodity which was the subject of such transportation, may, so far as the commerce clause of the federal constitution is concerned, be exerted in any way which the state's constitution and laws permit, provided, of course, it does not discriminate against the commodity because of

its origin in another state. That under such circumstances a tax may be imposed upon the use as well as upon the sale of the commodity in domestic trade, without coming into conflict with the commerce clause, was specifically determined in *Bowman v. Continental Oil Co.*, 256 U. S. 642, 648."

These decisions were followed in the later case of *Gregg Dyeing Co. v. Query*, 286 U. S. 472, even though (as heretofore shown) the "sale" of the gasoline was taxed under one statute and its "use" under another.

May we note that such "use" taxes may, without offending the commerce clause, be lawfully exacted for storage and withdrawal from storage even as to articles intended for use in interstate commerce. *Eastern Air Transport v. Tax Commission*, 285 U. S. 147; *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249; *Edelman v. Boeing Air Transport*, 289 U. S. 249.

Section 13 of an Alabama Revenue Act provided that before any dealer in spirituous liquors offered the same for sale within the state, such dealer "introducing any such liquors into the State for sale" should pay a tax of 50 cents per gallon.

Previous sections of the statute laid a tax of 50 cents a gallon on all liquors manufactured in the state. In *Hinson v. Lott*, 75 U. S. 148, the validity of Section 13 was challenged on the ground that it violated the commerce clause. The court, while most emphatically holding that, standing alone, such section would be void as constituting a direct burden on interstate commerce, went on to say (75 U. S. 152-3):

"But a careful examination of that statute shows that it is not obnoxious to this objection. A tax is imposed by the previous sections of the same act of fifty cents per gallon on all whiskey and all brandy from fruits

manufactured in the state. In order to collect this tax, every distiller is compelled to take out a license and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come in the light of these earlier sections of the act, to examine the 13th, 14th, and 15th sections, it is found that no greater tax is laid on liquors brought into the state than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the state, the tax on those who sold liquors brought in from other states was only the complementary provision necessary to make the tax equal on all liquors sold in the state. As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the state, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the states."

These decisions, it will be seen, establish the principle that a state may lawfully tax the "use" of tangible personal property brought in from other states without violating the commerce clause so long as a like tax is imposed upon the use of goods of domestic origin, and it is immaterial that the latter takes the form of a sales tax.

(d) Answer to contention that compensating tax discriminates against articles because of ultra-state origin.

In the majority opinion of the two district judges we find the following (R. 29):

"• • • It is apparent that the tax is discriminating in its incidence against articles because of their origin in other states and that the Washington act was framed for the purpose of suppressing competition from without the state."

With this conclusion we must take issue. The tax applies alike to all personal property purchased at retail and used within the state, *wherever purchased*. Section 31 of the Act (*post*, p. 38) imposes a tax on all tangible personal property purchased subsequent to April 30, 1935, and used within the state, wherever purchased. By sections 32 (c) and 33 (*post*, p. 38) an off-set is allowed of any sales or use tax already paid, either in Washington or any other state. The tax is thus of general application. The place of purchase is immaterial. The measure is not specifically directed at property brought from sister states. Had the governor exercised his veto power as to the retail sales tax (Title III, *post*, p. 37), all tangible personal property purchased in Washington would nevertheless have been subject to the 2% "use" tax.

Indeed, even with the retail sales tax provisions in full force, the use of property purchased in Washington is subject to the compensating tax although exempt from the sales tax. For instance, casual and isolated sales and sales of bread, fresh fruit and vegetables and dairy products consumed off the premises are not subject to the sales tax (Sec. 19, *post*, p. 37), yet these articles are not exempted from the operation of the compensating tax. (See sec. 32, *post*, p. 38.)

Said Judge Haney in his dissenting opinion (R. 30-31):

"I cannot agree that the tax here laid, discriminates against commodities because of their origin in another state. The statute (Ch. 180, Sec. 31, Laws of Washington, 1935), levies the tax on the use of 'any article of tangible personal property,' and makes no distinction between articles, either because of the place of their origin or place of purchase. It is applicable to articles origi-

nating or purchased within the state of Washington as well as to those originating or purchased elsewhere.

"The following section (Sec. 32(c)), exempts from taxation 'the use of any article of tangible personal property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title whether under the laws of this state or of some other state of the United States.' Section 33 provides:

" 'If any article of tangible personal property has already been subjected to a tax by this or any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed.' "

"The effect of these two latter sections together with Sec. 31 is to tax the use of all personal property, the sale or use of which has not already been taxed by any state, including Washington, to the extent of two per cent of its purchase price. I see no discrimination in such a tax. As pointed out by defendants the articles exempt under the Washington sales tax law (see Sec. 19, Ch. 180, Laws 1935), even originating in Washington are subject to the use tax, see Sec. 32, *supra*.

"As to the universal applicability of the 'use' tax, we might fairly consider the result had the Governor of Washington vetoed the sales tax (Title III, Ch. 180, Laws of 1935). Under such circumstances it seems to me conclusive that the 'use' tax provided for in Sec. 31, *supra*, would have applied to the use of all tangible personal property, irrespective of its place of origin."

It is conceded, of course, that the offending "use" tax does not attach so long as the property involved is a subject of interstate commerce. It is only after the commodity's interstate journey has finally ended and the owner has exercised over it acts of dominion, wholly foreign to its purchase or transportation, that the tax is exacted.

True, as to ultra-state purchases, the purchase price in the sister state is used to measure the tax; but only as

a yard stick, and not because interstate commerce is involved. In *Hope Gas Co. v. Hall*, 274 U. S. 284, Your Honors refused to condemn a privilege tax imposed by West Virginia on the business of producing natural gas within the state computed on the value of the gas produced "as shown by the gross proceeds derived from the sale thereof by the producer," in other states, where construed as requiring that the tax be computed on the value of the gas at the well. And see also *American Mfg. Co. v. St. Louis*, 250 U. S. 459.

Here, as in the *Hope Gas* case, the tax is measured by the best evidence of the value of the article at the place where used, namely: its purchase price wherever purchased, plus necessary cost of transportation. (Sec. 35 (a), *post*, p. 39.)

In *Texas Co. v. Brown*, 258 U. S. 466, 476, it was held that a tax levied in respect of goods of a particular kind was not to be held discriminatory as against interstate commerce merely because goods of that kind were not produced locally but were all imported from other states, Your Honors following *Askren v. Continental Oil Co.*, 252 U. S. 444.

Here, while the compensating tax, as such, applies chiefly to the use of goods of ultra-state origin, yet a similar tax measured by the same yard stick applies to substantially all goods purchased within the taxing state. Surely, here is no discrimination against interstate commerce.

(d-1) Answer to contention that compensating tax discriminates against articles because of ultra-state origin. Review of decisions cited by district court.

A case cited by the district court and principally relied upon by plaintiffs below, was *Baldwin v. Seelig*, 294 U. S. 511. With respect to this case the state supreme court said in *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 323:

"The case of *Baldwin v. Seelig*, 294 U. S. 511, much relied on by the appellant, is not controlling. There, the question was whether milk, purchased in another state and brought into the state of New York, had lost its interstate character by reason of the fact that it had been taken from the cans and bottled before being distributed to the customers, and it was held that the bottling did not take it out of interstate commerce. There, the milk had not come to rest within the state at the time of the bottling, while, here, the articles purchased in Portland, Oregon, came to rest and passed beyond interstate commerce, when they were delivered to the appellant in this state for its use."

In other words, the Vermont milk was held to have retained its interstate character both when sold in cans and when sold in bottles. Not so with plaintiffs' property here. No claim is made that the interstate journey of the articles here involved had not finally ended when the offending "use" tax was sought to be exacted.

But we submit that for other reasons *Baldwin v. Seelig* is not in point here. Surely it does not follow that because a state may not dictate the price at which imported articles shall be purchased in sister states, property whose interstate journey has ended is to be exonerated from a state "use" tax applicable indiscriminately to all property. Vermont producers and dealers might well complain of a New York statute fixing prices on goods shipped from Vermont to New York, but could they in

justice complain of a New York tax applicable alike to all goods, whether purchased in Vermont or New York? Likewise New York consumers might well complain of a New York statute fixing the minimum prices at which they could purchase goods shipped from Vermont, but on what possible theory could they be heard to claim that simply because their property was acquired in Vermont it should be exempt from a local tax imposed on the "use" of all property, wherever purchased? The commerce clause, Your Honors, was intended to prevent burdensome state restrictions on interstate trade—*not to destroy local trade, by granting exemptions and immunities with respect to goods simply because acquired in interstate commerce.*

Baldwin v. Seelig was not, we submit, intended to overrule *Gregg Dyeing Co. v. Query*, 286 U. S. 472, *Bowman v. Continental Oil Co.*, 256 U. S. 642, *Hart Refineries v. Harmon*, 278 U. S. 499, *Hinson v. Lott*, 75 U. S. 148, and other cases sustaining state "use" taxes as applied to goods purchased in other states.

The other supreme court decisions cited by the district court are *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, and *Lemke v. Farmers' Grain Co.*, 258 U. S. 50. In these cases state legislation regulating the purchase of commodities intended for shipment to other states was held offensive to the commerce clause on the theory that interstate commerce included the purchase of articles intended for interstate shipment.

These decisions, to which we may add *Shafer v. Farmers' Grain Co.*, 268 U. S. 189, probably represent the extreme limit to which this court has gone in circum-

scribing state police power as applied to articles intended for interstate commerce.

But neither these cases, nor any others cited by plaintiffs below, go to the extent of holding that the "use" of property for the purposes for which intended in the state of such property's final destination, is a part of its interstate journey, and therefore not subject to a non-discriminatory tax. As heretofore shown, the decisions of this court are quite to the contrary.

(e) Tax Commission without authority to declare purpose of compensating tax.

In its majority opinion the district court seems much impressed with the statement volunteered by the tax commission that "the primary purpose of the compensating tax is to protect the merchants of Washington from discrimination" etc. (R. 28)

While the federal courts have frequently given consideration to a legislative declaration in the act itself, and the state court's pronouncement as to the purpose of state legislation, never before, so far as we can find, has a federal court been influenced by what mere administrative officers had to say of such legislative purpose.

Of course the tax commission had no authority to declare the purpose or object of this revenue measure. The court will find this volunteered statement of the tax commission in its rules and regulations adopted October 16, 1935 (R. 34), more than six months after the passage of the act (p. 849, Laws of Wash., 1935), and after the state supreme court's decision upholding its constitutionality. (Aug. 28, 1935: 183 Wash. 317)

The tax commission being of purely statutory creation has only such powers as are expressly conferred

upon it by statute, or may properly be implied from the nature of the particular duties imposed upon it. 59 C. J. 111.

Executive construction is never resorted to save in case of ambiguity. 59 C. J. 1030. Here there is no suggestion that the meaning of the offending statute is doubtful.

While the act empowers the tax commission "to make and publish rules and regulations, not inconsistent with this act, necessary in enforcing its provisions" (Sec. 208, *post*, p. 39) obviously the commission is not, and of necessity could not be, thereby clothed with legislative authority to declare the legislature's intent in the enactment of the measure.

(f) Obvious legislative purpose not to discriminate, but rather to avoid discrimination.

Were the compensating tax imposed only with respect to property purchased within the state, the act would clearly have discriminated *in favor of* the users of property purchased elsewhere. If exacted only on the use of property purchased beyond the state's borders, the act would necessarily fall as unlawfully discriminating against the subjects of interstate commerce. But since the act applies to all articles wherever purchased, it discriminates against none, and hence cannot, we submit, be held offensive to the commerce clause.

(g) Off-set of "use" and sales taxes already paid——In practice, no such taxes would be paid in other states, since purchases would be interstate.

The tax measure provides for an off-set against the tax thereby imposed, of any sales or use tax paid in re-

spect to said article either in Washington or in any other state. (Secs. 32-3, *post*, p. 38.)

In its majority opinion, the district court seems to conclude that the compensating tax act is unlawfully discriminatory between sister states because an article purchased in a state imposing no sales or use tax would be subject to the Washington tax, while the same article might be wholly or partially exempted if purchased in a state imposing a similar tax. (R. 27)

The difficulty with this objection is that it lacks real substance. Whether a state tax in fact burdens interstate commerce must, we submit, be determined by actualities, not mere fancied academic objections. Obviously, the normal transaction by which an article purchased in one state for use in another, would be an interstate sale as to which no tax could be lawfully exacted by the state where purchased.

"It is well settled that a state cannot lay a tax upon interstate or foreign commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on. * * * Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." Vol. 7 Encyc. U. S. Sup. Crt. Reports, pp. 441-443.

Where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation, and the transaction is interstate and within the protection of the commerce clause. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290; *Lemke v. Farmers Grain Co.*, 258 U. S. 50; *A. G. Spaulding & Bros. v. Edwards*, 262 U. S. 66, 69, 70; *Flanagan v. Federal Coal Co.*, 267 U. S. 222; *Furst v. Brewster*, 282 U. S. 493, 497.

It is significant that of the approximately $900,000 worth of machinery and supplies purchased by plaintiffs in outside states for use in Washington during May and June, 1935 (R. 11), a large proportion was purchased in California, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, New Jersey, Ohio and Pennsylvania (R. 48-59), all imposing taxes on retail sales (R. 14-15), yet there is neither allegation nor proof that plaintiffs paid one penny of sales tax to any state on any of these purchases!

True, it is conceivable that in rare instances individuals might make local purchases in other states imposing a sales or use tax and later bring the property so purchased to Washington for use in that state, but this, the court judicially knows, is not the practice, and we submit that a state revenue law should not be condemned on merely assumed facts which may never in fact exist. It is highly probable that no effort would be made to collect the Washington compensating tax under such circumstances, and it will be time enough, we submit, to assail the tax measure on this ground when such attempt at collection is actually made by the state administrative officers. *Edelman v. Boeing Air Transport*, 289 U. S. 249, 253.

(g-1) Off-set of "use" and sales taxes already paid—Designed to avoid double taxation.

In so far as taxes already exacted by the state of Washington are thus off-set, the act was clearly intended to avoid double taxation. And while unquestionably two or more states may each constitutionally impose a separate tax upon the same article for the same period, yet the effect, while not technically amounting to double tax-

ation, is nevertheless so palpably unjust, that a state tax measure so framed as to avoid such onerous result, should not, we submit, be stricken down as a discrimination against sister states whose merchants may conceivably profit, and can never be injured therefrom.

Something is wrong, we submit, with a process of reasoning which condemns a tax as discriminatory because not exacted twice, even by two independent taxing sovereignties.

(g-2) Off-set of "use" and sales taxes already paid—Provision does not tend to encourage or discourage commerce with either taxing or non-taxing states.

Since the Washington purchaser is required to pay a tax equal to 2% of the purchase price either to Washington (if the article be purchased either in Washington or some other non-taxing state), or to the outside taxing state where the purchase is made, it must be apparent that the compensating tax act offers no inducement whatever for negotiating the purchase in any particular state. Such purchaser is subjected to the tax wherever the purchase be made.

In considering such claimed discrimination may we not properly consider the purchaser's attitude before and after the enactment of the offending tax measure. In the absence of the compensating tax law, the Washington purchaser proposing to make an ultra-state purchase would, other things being equal, doubtlessly choose merchants of the non-taxing state. But by removing the inducement of the Washington purchaser to choose the non-taxing state wherein to make his purchase, the enactment of the compensating tax act has actually tended to *avoid* rather than to *induce* discrimination between the taxing and non-taxing states.

(h) Tax on transportation cost to place of use as part of purchase price does not result in discrimination against interstate commerce.

Said the majority of the trial court:

"The discrimination more forcibly appears where the defendants under section 35(a) have added $21,798.43 to the purchase price of the articles as transportation costs in other states which are subject to tax under the Washington act." (R. 27.)

We fail to follow the majority's reasoning. Under the tax commission's rules and regulations the "cost of transportation" upon which the tax is computed cannot exceed the "ordinary cost of transportation of like property to a person dealing therein." (R. 10.) Obviously, were a given article purchased at the place of use, such necessary transportation cost would be included in the purchase price. Thus, the total sum by which the tax is measured is precisely the same whether the purchase be made at the place of use, or in some distant state. In either case the yardstick is the cost of the article to the purchaser *at the place of use*. Were the tax measured by cost at place of purchase—let us say, New York—the merchants of both Washington and intervening states might well, we submit, complain of the tax measure as discriminatory.

(i) Even eliminating one or both of the provisions off-setting sales or use taxes paid in Washington or other States, and taxing transportation cost to place of use, the remainder of the Act should be allowed to stand.

This, we submit, is particularly true of an Act containing a severability clause such as the one found in this revenue measure. (Sec. 212, *post*, p. 39.)

In the light of this severability clause the state supreme court, in the recent case of *Benjamin Franklin*

Thrift Stores v. Henneford, 60 Pac (2d) 86, 87 Wash. Dec. (Adv. Shts.) 390, struck a portion of the rate applicable to chain store warehouses found to be discriminatory under chapter 180, Laws of 1935, in order to sustain that portion of the rate found to be non-discriminatory.

It is the general rule that a revenue act is not invalid as a whole because it contains invalid exemptions, where the objectionable part is merely incidental to the main purpose of the act.*

Examination will show that in many of the cases cited in the foot-note no reference is made to the existence of a severability clause, from which fact it may be fairly assumed that none existed.

The case of *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, involved the validity of a state statute imposing a privilege tax on the generation and transmission of electrical energy, but which contained a provision (Section 5) exempting electricity used for pumping irrigation water. Such exemption, it was claimed, rendered

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* *Fairley v. Duluth*, 150 Minn. 374, 185 N. W. 390; *McLendon v. State*, 6 Ala. App. 19, 60 So. 406; *Davies v. Hot Springs*, 141 Ark. 521, 217 S. W. 769; *Johnston v. Long Furniture Co.*, 113 Miss. 373, 74 So. 283; *Adams v. Standard Oil Co.*, 97 Miss. 879, 53 So. 692; *Morrison v. Larkin*, 26 La. Ann. 699; *Fox's Appeal*, 112 Pa. 337, 4 Atl. 149; *Standard Lbr. Co. v. Pierce*, 112 Or. 314, 228 Pac. 812; *N. R. Bagley Co. v. Cameron*, 282 Pa. 84, 127 Atl. 311; *Stillman v. Lynch*, 56 Utah 540, 192 Pac. 272; *Bacon Service Corp. v. Huss*, 199 Cal. 21, 248 Pac. 285; *Gulfport Bldg. & Loan Assn. v. City of Gulfport*, 155 Miss. 498, 124 So. 658; *Aetna Life Ins. Co. v. Eaton* (C. C. A.), 43 Fed. (2d) 711; *Colorado Nat. Life Assn. v. Clayton*, 54 Colo. 256, 130 Pac. 330; *State ex rel. Norwood v. N. Y. Life Ins. Co.*, 119 Ark. 314, 178 S. W. 1099; *N. W. Mut. Life Ins. Co. v. Lewis and Clarke Co.*, 28 Mont. 484, 73 Pac. 982; *Di Lustro v. Penton*, 106 Fla. 198, 142 So. 898; *Hudson v. Stuart*, 166 Miss. 339, 145 So. 611; *Union Bank & Trust Co. v. Blan*, 223 Ala. 180, 135 So. 612; *Boyd v. State*, 217 Wis. 149, 258 N. W. 330; *Utah Power & Light Co. v. Pfost*, 286 U. S. 165.

the whole act void as discriminatory. There as here the highest state court had not passed upon the effect of eliminating the offending provision. There as here, there was a severability clause. Your Honors held that if the exemption resulted in unlawful discrimination, the exemption clause could be eliminated, and the remainder of the act would stand. The following is quoted from the opinion:

"Nor do we think the inseparability of the section from the rest of the act appears from the face of the legislation. The act itself (section 11) provides that an adjudication that any provision of the act is unconstitutional shall not affect the validity of the act as a whole, or of any other provision, or section thereof. While this declaration is but an aid to interpretation and not an inexorable command (*Dorchy v. Kansas*, 264 U. S. 286, 290, 44 S. Ct. 323, 68 L. Ed. 686), it has the effect of reversing the common-law presumption, that the Legislature intends an act to be effective as an entirety, by putting in its place the opposite presumption of divisibility; and this presumption must be overcome by considerations that make evident the inseparability of the provisions or the clear probability that the Legislature would not have been satisfied with the statute unless it had included the invalid part. *Williams v. Standard Oil Co.*, 278 U. S. 235, 241, 242, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596.

"It fairly may be assumed that the Idaho Legislature, in making this declaration, had in mind every provision of the act, including section 5. The primary object of the statute under review, plainly, is to raise revenue. The exemption made by section 5 and the provisions for carrying that exemption into effect are secondary. We find no warrant for concluding that the Legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that, if the Legislature had expressed itself specifically in respect of the matter, it would have de-

clared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fail for lack of validity. *Field v. Clark*, 143 U. S. 649, 696, 697, 12 S. Ct. 495, 36 L. Ed. 294; *People ex rel. Alpha P. C. Co. v. Knapp*, 230 N. Y. 48, 60-63, 129 N. E. 202."

In the present case, the state Legislature enacted the off-set provision with the laudable purpose of avoiding dual taxation, even by separate sovereignties, and the tax on transportation cost to place of use with the obvious purpose of avoiding discrimination. These provisions are merely incidental to the primary object of the act, that of raising revenue. As in case of the Idaho statute, the Washington Legislature, we submit, would have preserved the tax—the vital aim of the act—even though the offending provisions "should fail for lack of validity."

(j) Trial court correctly held that plaintiffs, as independent contractors performing work and furnishing materials in construction of the Dam, were not exempted from compensating tax because a federal instrumentality.

The district court's decision on this point is, we submit, convincing. See *Silas Mason Co. v. Henneford*, 15 Fed. Supl. 958, 959-960 (R. 25-26).

May we also note that on October 26, 1936, the state supreme court, in a unanimous *en banc* decision, after an exhaustive review of the pertinent authorities, reached the same conclusion as the district court. See *Silas Mason Inc. v. State Tax Commission*, — Wash. —, 88 Wash. Dec. (Adv. Shts.) 60.

In support of our position, we need do no more, we feel, than refer to these two well-considered opinions.

For the reasons urged, we respectfully submit that the order of the statutory three-judge court granting the interlocutory injunction restraining the collection of the offending tax, should be reversed.

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APPENDIX A

Pertinent provisions of chapter 180, Laws of Washington of 1935, imposing a 2% retail sales tax and compensating tax.

Title III. Tax on Retail Sales

"SEC. 16. From and after the first day of May, 1935, there is hereby levied and there shall be collected a tax on each retail sale in this state equal to two per cent of the selling price."

* * * * * * * * * *

"SEC. 19. The tax hereby levied shall not apply to the following sales:

"(a) Casual and isolated sales by a person who is not engaged in the business of selling tangible personal property at retail;

"(b) Sales made by persons in the course of business activities with respect to which tax liability is specifically imposed under title V of this act, when the gross proceeds from such sales must be included in the measure of the tax imposed under said title V."

("Title V" imposes a tax measured by a percentage of gross earnings on various public service activities. See secs. 36 to 43, pp. 728-733, ch. 180, Laws of 1935.)

"(c) The distribution and news stand sale of newspapers;

"(d) Sales which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;

"(e) Sales of motor vehicle fuel taxable under chapter 58 of the Laws of 1933, section 5 (being Rem. Rev. Stat., section 8327-5);

"(f) Sales made on relief vouchers issued by the department of public welfare or by any county or city or other welfare agency;

"(g) Sales of fresh sweet milk, raw unprocessed fruits and vegetables, butter, eggs, cheese, canned milk and unsweetened bread in loaf form (including rolls and buns), sold for consumption off the premises.

* * * * * * * * * *

"SEC. 21. The tax hereby imposed shall be paid by the buyer to the seller, and it shall be the duty of each seller to collect from the buyer the full amount of the tax payable in respect to each taxable sale. . . .

. . . . . .

Title IV. Compensating Tax

"SEC. 31. There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state any article of tangible personal property purchased subsequent to April 30, 1935. Such tax shall be levied and collected in an amount equal to the purchase price paid by the taxpayer multiplied by the rate of 2%.

"SEC. 32. The provisions of this title shall not apply:

"(a) In respect to the use of any article of tangible personal property brought into the State of Washington by a non-resident thereof for his or her use or enjoyment while within the state;

"(b) In respect to the use of tangible personal property purchased other than at retail;

"(c) In respect to the use of any article of tangible personal property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title whether under the laws of this state or of some other state of the United States;

"(d) In respect to the use of tangible personal property purchased during any calendar month, the total purchase price of which is less than twenty ($20.00) dollars.

"SEC. 33. If any article of tangible personal property has already been subjected to a tax by this or any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed.

"SEC. 34. Each taxpayer subject to the provisions of this title shall, on or before the fifteenth day of every calendar month, file a return with the commission showing in detail the total quantity of tangible personal prop-

erty used by him within the state during the preceding calendar month subject to the tax herein imposed, and such other information as the commission may deem pertinent. Each taxpayer shall remit to the commission with each such return the amount of tax shown thereon to be due.

"SEC. 35. For the purposes of this title:

"(a) The term 'purchase price' shall mean the consideration paid or given or contracted to be paid or given by any person to the seller of an article or tangible personal property for the article purchased. The term shall include, in addition to the consideration paid or given or contracted to be paid or given, the actual cost of transportation from the place where the article was purchased to the person using the same in this state."

* * * * * * * * * *

Title XVIII. General Administrative Provisions

* * * * * * * * * *

"SEC. 208. The administration of this act shall be vested in and exercised by the tax commission which shall prescribe forms and rules of procedure in conformity with this act for the determination of the taxable status of any person, for the making of returns and for the ascertainment, assessment and collection of taxes and penalties imposed hereunder. The tax commission shall make and publish rules and regulations, not inconsistent with this act, necessary in enforcing its provisions, which rules and regulations shall have the same force and effect as if specifically included herein, unless declared invalid by the judgment of a court of record not appealed from.

* * *

* * * * * * * * * *

Title XX. General Provisions

"SEC. 212. If any title, section, subdivision of a section, paragraph, sentence, clause or word of this act for any reason shall be adjudged invalid, such judgment shall not affect, impair or invalidate the remainder of this act but shall be confined in its operation to the title, section, subdivision of a section, paragraph, sentence,

clause or word of the act directly involved in the controversy in which such judgment shall have been rendered. If any tax imposed under this act shall be adjudged invalid as to any person, corporation, association or class of persons, corporations or associations included within the scope of the general language of this act such invalidity shall not affect the liability of any person, corporation, association or class of persons, corporations or associations as to which such tax has not been adjudged invalid. It is hereby expressly declared that had any title, section, sub-division of a section, paragraph, sentence, clause, word or any person, corporation, association or class of persons, corporations or associations as to which this act is declared invalid been eliminated from the act at the time the same was considered the act would have nevertheless been enacted with such portions eliminated: *Provided, however,* That if the provisions of section 4 (e) shall be declared invalid as to a national banking association, state bank, mutual savings bank or building and loan or savings and loan association the provisions of said section 4 (e) shall be deemed inoperative as to all institutions of the types hereinabove mentioned."

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. 418

HAROLD H. HENNEFORD, THOMAS S. HEDGES, and T. M. JENNER, members of the Tax Commission of the State of Washington,
Appellants,

vs.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as ATKINSON-KIER COMPANY, and MASON-WALSH-ATKINSON-KIER COMPANY,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' REPLY BRIEF AND ADDITIONAL AUTHORITIES

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ADDITIONAL AUTHORITIES

In support of their position that the compensating tax, viewed as an excise, is not violative of the commerce clause (App. Brf., p. 16), appellants add the following:

Sheppard v. Musser, — Tex. —, 92 S. W. (2d) 219, upholding a state tax upon the use of cigarettes of ultra-state origin, after coming to rest within the state, as not an unlawful interference with interstate commerce.

Powell v. Maxwell, 210 N. C. 211, 186 S. E. 326, holding a state statute imposing a tax for the privilege of using motor vehicles within the state not to violate the commerce clause as applied to automobiles purchased outside the state and then brought into the state.

The following is quoted from the case last cited in response to what was said in the majority opinion below as to the off-setting of taxes paid in other states resulting in discrimination between states (see App. Brf., p. 30):

"When the substance of subsection 13 of section 404, chapter 371, Public Laws 1935, is regarded rather than its form, and its operation tested by its practical application, it is manifest that there is no discrimination in favor of the North Carolina bought automobile over the Virginia bought automobile by the remission of the privilege or excise tax to the owners of the former, since the result is, as stated in the act itself, 'to avoid in effect double taxation' on automobiles bought from North Carolina dealers and to make the tax on all new bought automobiles equal. There can be no discrimination where there is equality." (186 S. E. 329.)

REPLY BRIEF

Appellees' contention that compensating tax designed to obstruct interstate commerce.

Because the sales and compensating tax measures do not actually place a bounty on interstate commerce by exempting articles of ultrastate origin, counsel pretends to discover a legislative purpose actually to obstruct commerce between the states.

This, of course, is not true. Interstate commerce cannot be burdened simply by failure to subsidize. The tax being precisely the same wherever an article be purchased, interstate commerce flows as freely as though neither sales nor "use" tax were exacted.

It is urged that the compensating tax is not a true revenue measure. Can such claim be seriously considered, when in this very suit plaintiffs seek the nullification of over $18,000 in taxes covering only a two-months period? (R. 11.) Can it be said that an exaction of 2% of the annual purchases made by the people of a state the size and population of Washington is not a true revenue measure?

That the tax commission was without authority to declare the purpose of the compensating tax has been heretofore shown. (App. Brf., p. 27.)

But, in any event, the court will not inquire into the legislative purpose of a revenue measure.

In *Magnano Co. v. Hamilton*, 292 U. S. 40, 44, Your Honors said, in sustaining a tax of 15 cents per pound on butter substitutes sold within the state, a tax claimed to be prohibitive:

"Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry."

Were the rule otherwise, it would, we submit, most certainly have been applied in those cases holding that a tax levied in respect of goods of a particular kind is not discriminatory as against interstate commerce merely because goods of that kind are not produced locally but are all imported from other states. See *Texas Co. v. Brown*, 258 U. S. 466, 476; *Askren v. Continental Oil Co.*, 252 U. S. 444; *Magnano v. Hamilton*, 292 U. S. 40.

May we also point out that the legislature itself thus expressly declared its purpose in the exaction of the various taxes imposed by the 1935 Revenue Act, including, of course, the sales and compensating taxes:

"The limitations on the taxing power of the various municipalities of the state make it imperative that the state assume a larger part of the expense necessary to provide reasonable support for public education and for the care of indigent persons and the unemployed. To meet the obligations so imposed, and better to distribute the burden of taxation, the State of Washington hereby declares its purpose to levy a tax on persons engaged in business activities and upon commodities, estates and gifts as enumerated in this act and in the manner hereinafter in this act set forth." Sec 2, Chap. 180, Laws of Wash. 1935.

Appellees' contention that compensating tax is in effect sales tax because exacted only on use of goods purchased.

The tax is exacted, not on the sale or the privilege of making a sale, but upon the privilege of use within the state. True, the tax is imposed only as to property purchased at retail, but this limitation is for the obvious purpose of avoiding discrimination in its application as

the complement of the retail sales tax imposed only with respect to articles purchased at retail. One acquiring tangible personal property other than by purchase at retail is exempted from the operation of both the sales and compensating taxes. But he is subject to both with respect to articles purchased at retail for the purpose of transformation into some other article, as, for instance, steel and wood for the construction of a machine.

Appellees' contention that merchants of states imposing no sales tax may be burdened with the equivalent in other taxes.

It is urged that the Oregon merchant, for instance, because relieved of a sales tax, may be subject to a correspondingly increased property or income tax.

The short answer is, of course, that the sales and "use" taxes are imposed by Washington on its own citizens to raise revenue required for its own purposes. The constitutional provisions as to freedom of interstate commerce, most certainly cannot demand that each state's taxation policy be circumscribed by the taxation methods of sister states.

The tax is imposed, not on the Oregon merchant, but upon the use of property in Washington. If Washington has avoided discrimination so far as its own tax laws are concerned, the constitutional requirements should, we submit, be satisfied.

Appellees' contention that compensating tax designed to attach before interstate commerce ceases.

Of course there is nothing in the act remotely indicating any such legislative purpose. No such construction was given to the act by the state supreme court in

sustaining the tax. See *Vancouver Oil Co. v. Henneford*, 183 Wash. 317.

That no attempt is made to collect the tax with respect to articles while still subjects of interstate commerce, is sufficiently evidenced by the following statement in the tax commission's letter to plaintiff (R. 34):

"You are advised that tax liability • • • arises at the time tangible personal property is put to use within the state of Washington. Such property is put to use by the first act *after delivery is completed within the state* by which the article purchased is actually used or made available for use with intent actually to use the same within the state." (Emphasis supplied.)

No injunction should issue unless the administrative officers in collecting the tax, are actually invading plaintiffs constitutional rights. *Edelman v. Boeing Air Transport*, 289 U. S. 249.

It is well settled, of course, that where to construe a state statute as applicable to interstate commerce would make it unconstitutional as a regulation of such commerce, it will be held, if possible, to apply only to commerce wholly within the state. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; Vol. 7, Encyc. U. S. Sup. Crt. Rep., p. 356, note 75.

Moreover, even could the act be construed as imposing the tax liability before the property's interstate journey has finally ended, it is apparent that the offending provisions could and should be eliminated without affecting the unobjectionable features.

"A statute which affects and regulates both interstate and intrastate commerce is not necessarily wholly invalid. It will be sustained and enforced so far as it affects commerce wholly within the state, provided the

allowed and prohibited parts are severable." Vol. 7, Encyc., U. S. Sup. Crt. Rep., p. 356.

Moreover, plaintiffs are in no position to claim exemption from the tax on the ground urged, since they expressly allege that the articles for the use of which the tax is here sought to be imposed were "used in and about and for the purposes of the construction of the Grand Coulee Dam." (R. 11.)

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it; that is, a legal interest in defeating it. The objection to the constitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance." Vol. 4, Encyc. U. S. Sup. Crt. Rep., p. 74, and Supplement.

For the reasons urged in this and our opening brief, we respectfully submit that the order granting the interlocutory injunction should be reversed.

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R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Attorneys for Appellants.

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IN THE

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OCTOBER TERM, 1936

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Appellants,

vs.

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Appellees.

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APPELLANTS' REVISED REPLY BRIEF AND ADDITIONAL AUTHORITIES

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ADDITIONAL AUTHORITIES

Similar laws of other states.

During the first argument appellants' counsel was asked what, if any, other states had adopted

compensating or "use" tax measures similar to that of Washington. Investigation shows that California, Colorado, Oklahoma and Ohio have enacted similar general measures, and North Carolina, a "use" tax applicable only to automobiles.* Of course most of the states have adopted similar "use" taxes applicable to gasoline.

Suggestion that full tax attaches though "use" be brief.

Answering this observation by a member of the court, it was pointed out during the first argument that this would be likewise true of a property tax levied annually. If present in the state on the assessment date, personal property is subject to the entire annual tax, though removed the next day. The following is quoted from *Aero Transit Co. v. Georgia Commission*, 295 U. S. 285, 289:

"The appellant urges the objection that its use of roads in Georgia is less than that by other carriers engaged in local business, yet they pay the same charge. * * * The fee is for the privilege of a use as extensive as the carrier wills that it shall be. * * * One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may."

Viewed as an excise, compensating tax not violative of commerce clause.

To the cases cited under this head in our opening brief (pp. 16 *et seq.*) may we add *Monamotor*

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*See Ch. 361, Laws of Cal. 1935; Laws of Colo. 1936, H. B. 13, 2nd Ex. Sess.; Ch. 66, Art. 7, sec. 4(j), Laws of Okla. 1935; Laws of Ohio, 1st Special Sess. 1935, H. B. No. 590 (Secs. 5546-25 to 5546-47, Ohio Gen. Code); Ch. 371, art. V, sec. 404, subsec. 18, Laws of N. C. 1935.

Oil Co. v. Johnson, 292 U. S. 86, holding that a state may impose a tax on the local use of gasoline imported from without the state.

Off-set of "use" and sales taxes already paid designed to avoid double taxation.

In our opening brief (pp. 30-31) we pointed out that while perhaps two or more states may each constitutionally impose a separate tax upon the same article for the same period, yet a state tax measure so framed as to avoid such onerous result, should not be condemned as discriminatory.

In *Powell v. Maxwell*, 210 N. C. 211, 186 S. E. 326, holding a state statute imposing a tax for the privilege of using motor vehicles within the state not to violate the commerce clause as applied to automobiles purchased outside, and brought into, the state, the court said with respect to a similar off-set provision:

"When the substance of subsection 13 of section 404, chapter 371, Public Laws 1935, is regarded rather than its form, and its operation tested by its practical application, it is manifest that there is no discrimination in favor of the North Carolina bought automobile over the Virginia bought automobile by the remission of the privilege or excise tax to the owners of the former, since the result is, as stated in the act itself, 'to avoid in effect double taxation' on automobiles bought from North Carolina dealers and to make the tax on all new bought automobiles equal. There can be no discrimination where there is equality." (186 S. E. 329.)

In the recent case of *Colgate v. Harvey*, 296 U. S. 404, 420, it was said:

"Thus, the tendency of the plan is to avoid taxing twice what is, in effect, the same thing. And conceding the power of the state to impose double or even multiple taxation, legislation which is calculated to avoid that undesirable result certainly cannot be condemned as arbitrary."

REPLY BRIEF

Appellees' contention that compensating tax is in effect sales tax because exacted only on use of goods purchased.

The tax is exacted, not on the sale or the privilege of making a sale, but upon the privilege of use within the state. True, the tax is imposed only as to property purchased at retail, but this limitation is for the obvious purpose of avoiding discrimination in its application as the complement of the retail sales tax imposed only with respect to articles purchased at retail. One acquiring tangible personal property other than by purchase at retail is exempted from the operation of both the sales and compensating taxes. But he is subject to both with respect to articles purchased at retail for the purpose of transformation into some other article, as, for instance, steel and wood for the construction of a machine.

As a matter of fact, purchases at retail, as defined by the act, include virtually all property acquired by the user *except such as he himself produces.*

Thus, section 35 provides:

"For the purposes of this title:

* * * * * * *

"(b) The meaning ascribed to words and phrases in titles II and III * * * insofar as applicable, shall have full force and effect with respect to taxes imposed under the provisions of this title * * *." (Laws 1935, ch. 180.)

Section 5(d), title II, provides:

"(d) The term 'sale at retail' or 'retail sale' means every sale of tangible personal property other than a sale to one who purchases for the purpose of resale in the regular course of business or for the purpose of consuming the property purchased in producing for sale a new article or substance, of which such property is an ingredient or component, or a chemical used in processing same. The term shall not be construed to include sales of fede to persons producing for sale milk, eggs, wool, fur, meat or other substances obtained from livestock, animals or poultry." (Laws 1935, ch. 180.)

It is apparent, of course, that one proposing to use an article must either purchase it at retail as so defined or produce it himself. Even if received as a gift it must have been purchased by the donor, and its subsequent "use" by the donee would be taxable. In other words, the tax act would be no more comprehensive in its application were it exacted for the privilege of use of all tangible personal property acquired, but expressly exempting such property as the user himself produced.

Appellees' counsel make no contention that the tax offends the equal protection clause because the user is not taxed for the use of his own products. Nor could they, in view of the well-recognized wide range and flexibility of the state's power to classify for purposes of taxation. *Colgate v. Harvey*, 296 U. S. 404, 422-3; *Ohio Oil Co. v. Conway*, 281 U. S.

146, 159; *Tax Commissioners v. Jackson*, 283 U. S. 527, 537, and numerous cases reviewed.*

May we add that in the present age so infrequently do either persons or corporations make use of tangible personal property of their own production, that a claim of discrimination could scarcely be based on their exemption from the tax.

"Inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law." *Maxwell v. Bugbee*, 250 U. S. 525, 543; *Colgate v. Harvey*, 296 U. S. 404, 436.

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* In this connection, may we call attention to the following decisions sustaining taxes attacked as discriminatory under the equal protection clause:

Pacific Express Co. v. Seibert, 142 U. S. 339, (tax on express companies shipping over railroads and steamboat companies, but exempting other companies carrying express matter in vehicles of their own);

American Sugar Refining Co. v. Louisiana, 179 U. S. 89, (tax on persons and corporations carrying on the business of refining sugar and molasses, but exempting planters and farmers grinding and refining their own sugar and molasses);

Cook v. Marshall County, Iowa, 196 U. S. 261 274-5, sustaining classification as between retail and wholesale dealers in cigarettes;

Armour & Co. v. Virginia, 246 U. S. 1, 6, sustaining classification as between manufacturer selling his goods at place of manufacture and one engaged as a merchant in selling goods of his manufacture elsewhere than where made;

Broad River Power Co. v. Query, 288 U. S. 178, 180, (tax on production and sale of electricity, but exempting industrial plants generating electricity for own use and that of employes);

Continental Baking Co. v. Woodring, 286 U. S. 352, (tax on motor vehicles, but exempting transportation of livestock and farm products to market by the owner or supplies for his own use in his own motor vehicle); and *Hicklin v. Coney*, 290 U. S. 169, and *Aero Mayflower Transit Co. v. Georgia Public Service Com.*, 295 U. S. 285, holding substantially to the same effect.

Appellees' contention that offending tax was imposed to avoid effect of commerce clause.

As elsewhere pointed out, appellees' counsel argue that the compensating tax was imposed because the state legislature recognized its inability to tax interstate sales.

But even if true, the tax, we submit, is not to be condemned on this account. The court must assume that in enacting the entire Revenue Act of 1935 the legislature had in mind every limitation with respect to taxation contained in both the state and federal constitutions, and embodied therein only such exactions as were believed lawful. The court must likewise assume that in enacting such measure the legislature made every effort to avoid discrimination as between its citizens. *A retail sales tax alone would have produced "gross inequality and injustice" as between those making local purchases and those making ultra-state purchases. Wiloil Corp. v. Pennsylvania*, 294 U. S. 169, 174; *Woodruff v. Parham*, 8 Wall. 123, 137. If the legislature imposed the "use" tax to avoid such inequality and injustice, can it be condemned for so doing? We submit not. The commerce clause does not prevent the exaction by a state of a non-discriminatory property tax on goods brought from other states. Neither, we submit, does it prevent the exaction of permissible state excises which are designed to, and do avoid discrimination as between the residents of such state.

Thus, in *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 477, the "use" tax was imposed because, as Your Honors found, the state legislature realized "that large users of gasoline either were evading or would evade the" sales tax imposed "by bringing in gasoline in quantities from without the state, and storing it for their own purposes." And the legislative purpose, though not expressly recited, was no less plain in the other analogous cases sustaining "use" taxes as complements of a retail sales tax. *Bowman v. Continental Oil Co.*, 256 U. S. 642; *Monamotor Oil Co. v. Johnson*, 292 U. S. 86; *Hart Refineries v. Harmon*, 278 U. S. 499.

If then, in the exaction of the "use" tax, the legislative purpose was to avoid discrimination, should it not be lauded rather than condemned? May we here repeat the following excerpt quoted in our opening brief (p. 21) from *Hinson v. Lott*, 75 U. S. 148, 153:

"As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the state, we do not see in it an attempt to regulate commerce, *but an appropriate and legitimate exercise of the taxing power of the states.*" (Emphasis supplied.)

If, in the exaction of taxes, the legislature may classify as between property which has, and property which has not, borne its fair share of the tax

burden (*Watson v. State Comptroller*, 254 U. S. 122, 125), then obviously no legitimate complaint can be made of complementary tax measures designed to avoid discrimination in the taxes payable by the residents of a state.

Appellees' contention that tax commission clothed with authority to declare purpose of tax.

In their brief, appellees' counsel use as their principal text the tax commission's statement that "the primary purpose of the compensating tax is to protect the merchants of Washington from discrimination," etc. (R. 28).

Anticipating this, we pointed out in our opening brief (pp. 27-8) that the delegated power to make rules and regulations conferred upon the tax commission no authority to declare the legislature's motive in the enactment of the offending tax measure.

But the short and conclusive answer to appellees' contention is, we submit, that the purpose of a *lawful* tax is not a proper subject of judicial inquiry.

Answering the contention that a contested tax of 15 cents a pound on butter substitutes sold within the state had been enacted for the purpose of fostering the sale of butter and repressing the sale of oleomargarine, Your Honors said in *Magnano v. Hamilton*, 292 U. S. 40, 44:

"Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry."

And the above language was repeated in *Fox v. Standard Oil Co.*, 294 U. S. 87, 100-101.

In *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, a Pennsylvania statute imposing a tax on anthracite coal of 1½% of its value when prepared for market was assailed as an unlawful attempt to burden interstate commerce in that by levying such tax, Pennsylvania, having virtually a monopoly on anthracite, would be levying a tribute upon the consumption of other states. In emphasis of this contention, the governor of the state was quoted as urging the tax because of that effect. But Your Honors said (pp. 258-9):

"The contention that the tax is a regulation of interstate commerce seems to be based somewhat upon the declaration of the governor of the state of its effect upon consumers in other states. We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it, * * *."

Prior to 1908 Ohio imposed an excise tax on railroads measured by 1% of their gross receipts, both inter- and intrastate. In May, 1908, this court held a Texas tax of this kind invalid as to interstate receipts. (*Galveston, etc. Ry. Co. v.*

Texas, 210 U. S. 217.) In 1910 Ohio passed a new tax measure imposing an excise on railroads measured by 4% of their intrastate gross receipts only. In *Ohio Tax Cases*, 232 U. S. 576, it was contended that such four-fold increase in the tax rate as applied to intrastate receipts was made, not as a true measure of the privilege granted, but because of the state's inability to impose the tax on interstate receipts. But answering this contention, Your Honors said (pp. 592-3):

"The tax is, however, in substance as well as in form, an excise or privilege tax. Its reasonableness, unless some Federal right be violated, is within the discretion of the state legislature. * * *

"The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical facts alluded to as sufficient evidence of a sinister purpose, such as would justify this court in striking down the law. We could not do this without in effect denouncing the legislature of the state as guilty of a conscious attempt to evade the obligations of the Federal Constitution. Assuming the law was changed in 1910 because of a fear that the Cole Law would be held unconstitutional, the mere fact that, while excluding interstate earnings from the multiplicand, the multiplier was increased, is not of itself deemed sufficient evidence of an unlawful effort to burden a privilege that is not a proper subject of state taxation."

We must conclude, therefore, that the legislative purpose in imposing a lawful tax is not material. Were the rule otherwise, it would, we submit, most certainly have been applied in those cases sustaining special taxes imposed with respect to

goods not produced locally. See *Texas Co. v. Brown*, 258 U. S. 466, 476; *Askren v. Continental Oil Co.*, 252 U. S. 444; *Magnano v. Hamilton*, 292 U. S. 40.

But should we assume it proper to inquire into the legislative purpose of the tax, no reason suggests itself why the court should look further than section 2 of the 1935 Revenue Act which thus declares the purpose of all the various taxes imposed thereby:

"The limitations on the taxing power of the various municipalities of the state make it imperative that the state assume a larger part of the expense necessary to provide reasonable support for public education and for the care of indigent persons and the unemployed. To meet the obligations so imposed, and better to distribute the burden of taxation, the State of Washington hereby declares its purpose to levy a tax on persons engaged in business activities and upon commodities, estates and gifts as enumerated in this act and in the manner hereinafter in this act set forth." (Sec. 2, Chap. 180, Laws of Wash. 1935.

Appellees' contention that offending tax raises economic barrier between Washington and other states.

Plaintiffs' counsel rely chiefly on *Baldwin v. Selig*, 294 U. S. 511, condemning a New York statute prohibiting the retailing of milk of ultra-state origin if purchased from the producer at a price less than the minimum fixed by statute to be paid domestic producers. Said the court (p. 521):

"New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of

Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not."

In other words, New York said to the Vermont farmers:

"Your milk shipped to New York cannot be sold there unless you charge the same price for milk in Vermont as is paid New York producers!"

Obviously such a law would as effectively bar interstate commerce as would a tariff wall. But this is not true of the compensating tax statute. By this act, Washington says to all concerned:

"You may ship into Washington all the goods you like at any price you like, provided that when used in Washington, such goods shall be subjected to the same tax for the support of state government as goods purchased in that state."

Here, we submit, is no economic barrier. Never has it been considered that the exaction by a state of a non-discriminatory tax on goods as to which interstate commerce has ended, creates an economic barrier. As was said in *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 575:

"A system of taxation discriminating in favor of residents and domestic products and against non-residents and foreign products might result in commercial non-intercourse between the states, and as a regulation of interstate commerce would clearly be invalid. The objection, however, would not apply to a uniform tax upon goods which does not discriminate in favor of residents or products of the state. *Woodruff v. Parham*, 8 Wall. 123; *Hin-*

son v. Lott, 8 Wall. 148; *Emert v. Missouri*, 156 U. S. 296."

Baldwin v. Selig, *supra*, was not, we submit, intended to overrule *Gregg Dyeing Co. v. Query*, 286 U. S. 472; *Bowman v. Continental Oil Co.*, 256 U. S. 642; *Hart Refineries v. Harmon*, 278 U. S. 499, and *Monamotor Oil Co. v. Johnson*, 292 U. S. 86.

Appellees' counsel seem to argue that goods of ultra-state origin are not only immune from discriminatory taxation, but are entitled to exemption from taxes lawfully imposed on articles of domestic origin.

But interstate commerce is not, we submit, burdened simply by failure to subsidize. Washington cannot burden interstate commerce, but neither can she be criticized for failing to place a bounty on such commerce by exempting its subjects from taxes it may lawfully impose. To do so would itself result in palpable injustice and discrimination with respect to its own citizens. Said Your Honors in the recent case of *Wiloil Corp. v. Pennsylvania*, 294 U. S. 169, 174-5, in sustaining a gallonage tax with respect to gasoline shipped from an outside state in compliance with a contract made within the taxing state:

"The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought from another State, for that would unduly trammel state power of taxa-

tion and produce gross inequality and injustice. *Woodruff v. Parham*, 8 Wall. 123, 137. The limitation appellant puts on § 4 would operate to the extent of three cents a gallon in favor of liquid fuels delivered, as in this case, from a place in another State, against those delivered in Pennsylvania from sources in that Commonwealth over routes wholly therein. * * *

"Our decisions show that, if goods carried from one state have reached destination in another where they are held in original packages for sale, the latter has power without discrimination to tax them as it does other property within its jurisdiction. * * * (citing cases) * * * And as the rule applies whether the burden falls directly or indirectly (*Banker Bros. Co. v. Pennsylvania*, 222 U. S. 210) it is not material whether the tax is upon the sale and delivery or upon the property."

The commerce clause, we submit, was intended to prevent burdensome state restrictions on interstate trade—not to destroy local trade, by granting exemptions and immunities with respect to goods simply because acquired in interstate commerce.

Appellees' contention that merchants of states imposing no sales tax may be burdened with the equivalent in other taxes.

It is urged that the Oregon merchant, for instance, because relieved of a sales tax, may be subject to a correspondingly increased property or income tax.

The short answer is, of course, that the sales and "use" taxes are imposed by Washington on its own citizens to raise revenue required for its own purposes. The constitutional provisions as to free-

dom of interstate commerce, most certainly cannot demand that each state's taxation policy be circumscribed by the taxation methods of sister states.

The tax is imposed, not on the Oregon merchant, but upon the use of property in Washington. If Washington has avoided discrimination so far as its own tax laws are concerned, the constitutional requirements should, we submit, be satisfied.

Moreover, counsel's argument is unsound. The Oregon merchant may not have a taxable net income. Nor is he likely to pay a property tax on any considerable proportion of his normal stock. Self-interest induces low inventories on the assessment date. Besides, a merchant with a frequent turn-over obviously pays a property tax on only a fraction of his annual sales.

Appellees' contention that compensating tax designed to attach before interstate commerce ceases.

Of course there is nothing in the act remotely indicating any such legislative purpose. No such construction was given to the act by the state supreme court in sustaining the tax. See *Vancouver Oil Co. v. Henneford*, 183 Wash. 317.

That no attempt is made to collect the tax with respect to articles while still subjects of interstate commerce, is sufficiently evidenced by the following statement in the tax commission's letter to plaintiff (R. 34):

"You are advised that tax liability * * * arises at the time tangible personal property is put

to use within the State of Washington. Such property is put to use by the first act *after delivery is completed within the state* by which the article purchased is actually used or made available for use with intent actually to use the same within the state." (Emphasis supplied.)

No injunction should issue unless the administrative officers in collecting the tax, are actually invading plaintiff's constitutional rights. *Edelman v. Boeing Air Transport*, 289 U. S. 249.

It is well settled, of course, that where to construe a state statute as applicable to interstate commerce would make it unconstitutional as a regulation of such commerce, it will be held, if possible, to apply only to commerce wholly within the state. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; Vol. 7, Encyc. U. S. Sup. Crt. Rep., p. 356, note 75.

Moreover, even could the act be construed as imposing the tax liability before the property's interstate journey has finally ended, it is apparent that the offending provisions could and should be eliminated without affecting the unobjectionable features.

"A statute which affects and regulates both interstate and intrastate commerce is not necessarily wholly invalid. It will be sustained and enforced so far as it affects commerce wholly within the state, provided the allowed and prohibited parts are severable." Vol. 7, Encyc. U. S. Sup. Crt. Rep., p. 356.

In any event, plaintiffs are in no position to claim exemption from the tax on the ground urged, since they expressly allege that the articles for the use of which the tax is here sought to be imposed were "used in and about and for the purposes of the construction of the Grand Coulee Dam." (R. 11.)

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it; that is, a legal interest in defeating it. The objection to the constitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance." Vol. 4, Ency. U. S. Sup. Crt. Rep., p. 74, and Supplement.

For the reasons urged in this and our opening brief, we respectfully submit that the order granting the interlocutory injunction should be reversed.

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DEC 7 1936
CHARLES ELMORE CROPLEY

The Supreme Court of the United States

October Term, 1936

No. 418

HAROLD H. HENNEFORD, THOMAS S. HEDGES, and T. M. JENNER, members of the Tax Commission of the State of Washington, *Appellants,*

vs.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company, *Appellees.*

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

BRIEF OF APPELLEES

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FOREWORD

Inasmuch as appellants in their brief refer to appellees as "plaintiffs," and to appellants as "defendants," to avoid confusion we shall follow their example.

Defendants have printed pertinent provisions of the Revenue Act of 1935 containing the 2% retail sales tax and compensating tax as an appendix to their brief. For the convenience of this Court we complete this extract of the act by adding as an appendix to our brief the pertinent rules and regulations of the Tax Commission relating to the compensating tax, and the demand of the Tax Commission for payment thereof served upon plaintiffs, since these aid us in more readily arriving at an understanding of the act.

With these additions to the appendix, plaintiffs' statement of facts in their opening brief is adequate for an initial understanding of the case. The few further facts required for our use can best be introduced, we believe, in the course of the argument.

SUMMARY OF ARGUMENT

The argument of appellees raises a single point: that the questioned tax is an attempt to regulate interstate commerce, and is therefore invalid.

ARGUMENT

I.

The true nature of the questioned tax.

Of one challenging the validity of a state law on the ground that it is repugnant to the commerce clause, we bear in mind that this Court, in the late case of Foster Packing Co. v. Haydel, 278 U. S. 1, 10, has said:

> "It is open to him to show that in their practical operations its provisions directly burden or destroy interstate commerce. Minnesota v. Barber, 136 U. S. 313, 319. Brimmer v. Rebman, 138 U. S. 78, 81. In determining what is interstate commerce, courts look to practical considerations and the established course of business. Swift & Co. v. U. S., 196 U. S. 375, 398. Lemke v. Farmers Grain Co., 258 U. S. 50, 59, Binderup v. Pathe Exchange, 263 U. S. 291, 309. Shafer v. Farmers Grain Co., 268 U. S. 189, 198, 200."

Hence, this analysis of the declarations of purpose of the legislature and the tax commission of Washington, and of the practical operations of this "compensating tax."

In the first section of Title IV of the "Revenue Act of 1935" of this state, being the title that deals with this compensating tax (Sec. 31, Defts.' Br. 38), the tax appears to have a wide general application. But by subsequent sections, all transactions are exempted from it save only those in interstate commerce that have not paid in the seller state an equivalent sales or use tax. By this device, the legislature avoids

declaring outright that it intends to burden interstate commerce.

But this circuitous method of enactment naturally arouses inquiry as to the real purpose of the act, an inquiry that is largely answered by the act of the legislature in branding the enactment a "compensating tax". To compensate who, and for what? In the sense in which "compensating" is here used, Webster's Dictionary defines the word "compensate" as follows:

> "To make up for; counterbalance; make amends for."

Considering the relation of this compensating tax to the preceding title enacting a retail sales tax in exactly the same amount, it is plain that it is the intent of this "compensating tax" "to make amends for" the burden of the sales tax on domestic sales by placing a like burden on interstate sales. As a tax expressly laid on interstate sales would manifestly be unconstitutional, this so-called "compensating tax" is levied, to rest on the "use" of the personalty the moment the interstate purchase is received.

That this "use tax" is in reality but a thinly disguised sales tax is disclosed by the fact that it is made to rest, by the terms of the act (Sec. 31, p. 38, Dfts.' Br.), not on the use of all personalty, but only on the use of personalty "*purchased* subsequent to April 30th, 1935, the date when this combination sales and compensating tax went into effect. Thus, it is not the act of using, but the fact of purchasing, that gives rise to the tax.

But the defendants, as the Tax Commission of Washington, charged by law with "the administration of this act" (Sec. 208, p. 39, Dfts.' Br.) leave us in no slightest doubt as to the real meaning and purpose of the tax. Immediately after the Act went into effect, the commission formulated and published the following rule:

> "The primary purpose of the compensating tax is to *protect* the merchants of Washington from discrimination arising by reason of the inability of the state, because of the federal constitution, to impose a tax upon sales made to residents of this state by competitive merchants in other states." (R. 35: Appendix, this brief.)

In so interpreting the Act, the tax commission only emphasizes the fact that this act is as precisely adapted to that "primary purpose" as are the Federal tariff laws to their design. A compensating tax to protect domestic business from "discrimination" suggests that our national protective tariffs might well be called "compensating tariffs," just as the State's compensating tax with equal truth can be called a "protective tax."

The compensating tax being thus freed of any suspicion that its primary purpose might have been to raise revenue, it is not surprising that the trial judges, in their opinion, declared that

> "* * * it is apparent that the tax is discriminatory in its incidence against articles because of their origin in other states, and that the Washington act was framed for the purpose of suppressing competition from without the state." (R. 29.)

In this declaration they are joined by the three dissenting judges of the Supreme Court of Washington in Vancouver Oil Co. v. Henneford, 183 Wash., 324, 325, where these judges say:

> "Such a law stifles competition and sets up an economic barrier against commerce of other states."

It will be borne in mind that, by the order of the trial judges, their opinion, from which the above quotation is excerpted, was adopted as the findings of fact and conclusions of law of the trial court, under Equity Rule 70-½. (R. 33.)

The weight to be attached to the rules of the tax commission is shown by Section 208 of the act (p. 39, Dfts.' Br.), where the commission is commanded to

> "make and publish rules and regulations, not inconsistent with this act, necessary in enforcing its provisions, which rules and regulations shall have the *same force* and *effect* as if specifically included herein, unless declared invalid by the judgment of a court of record not appealed from."

In the light of this admission that the tax had to take the form of a compensating tax instead of a sales tax "because of the federal constitution," it is not surprising that learned counsel for the defendants cries out in protest (p. 27, Dfts.' Br.) at the use made of this rule by the trial judges, and urges this Court to close its eyes to what the defendants say the statute was intended to accomplish. We therefore inquire: What weight does this Court give to rules and regulations of an administrative agency, charged with the

enforcement of an act and authorized by the act to make such regulations?

> "The regulations were made pursuant to express authority (see § 1309 of the Revenue Act of 1918). They are valid unless unreasonable or inconsistent with the statute. United States v. Grimaud, 220 U. S. 506, 517-518; International Ry. Co. v. Davidson, 257 U. S. 506, 514; They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons. United States v. Moore, 95 U. S. 760, 763; Brewster v. Gage, 280 U. S., 327, 336."
>
> Fawcus Machine Co. v. U. S., 282 U. S., 375, 378.

See also:

U. S. v. Jackson, 280 U. S., 183, 193;
Lucas Amer. Code Co. v. U. S., 280 U. S., 445, 449;
Norwegian Nitrogen Co. v. U. S., 288 U. S., 294, 315;
Federal Land Bank Co. v. Warner, 292 U. S., 53, 55;
Spring City Co. v. Comm., 292 U. S., 182, 189.

But, if the rule making power of the commission were less comprehensive, this rule would still be useful as a ready confirmation of what more labored analysis of the statute itself demonstrates to be the fact. Indeed, counsel for defendants cannot present their own argument without inadvertantly confirming the view of the statute taken both by the tax commission and the trial judges. The burden of defendants' brief is an appeal to this Court to sustain the validity of this compensating tax, else the lack of it will

> "destroy local trade, by granting exemptions and immunities with respect to goods simply because

acquired in interstate commerce." (p. 26, Dfts.' Br.)

This is exactly the contention urged in vain on this Court in the prohibition cases, where it was strenuously urged that if laws prohibiting the sale of liquor imported from other states were held invalid, the enforcement of local laws would be gravely handicapped.

The parallel, in fact, is made particularly sharp by the syllabus of Bowman v. Ry. Co., 125 U. S. 465, where it is said:

> "A State cannot, for the purpose of protecting its people from the evils of intemperance, enact laws which regulate commerce between its people and those of other States of the Union, unless the assent of Congress, express or implied, is first obtained."

So here. The State of Washington cannot, for the purpose of protecting its merchants from the evils of competition enact laws that burden, and are intended to burden, interstate commerce, without the assent of Congress.

The fallacy of the excuse offered by counsel for this tax that it avoids discrimination in favor of sister-state merchants is disclosed by counsel in another part of their argument. At p. 15 of their brief, counsel contend that the compensating tax is "in effect a tax imposed, partially at least, in lieu of property taxes." Pointing to the 40-mill property tax limit law of Washington, they assert that this reduction of property taxes "made it necessary" to enact the sales tax law.

Exactly so. The sister-state of Oregon has no such property tax limit, and it also has a net income tax law, but no sales tax. Thus the merchant in Oregon pays on his stock of merchandise far heavier property taxes than his Washington competitor, and a net income tax of which his Washington competitor is wholly free. Then, when his goods move into Washington in interstate commerce, his sale, through this compensating tax, must make a further contribution of 2% to help defray Washington taxes. This is what counsel smoothly called "avoiding discrimination" by the compensating tax.

But who compensates the Oregon merchant for these heavier burdens of his own state's property and income taxes, when he seeks to do business with his Washington competitor on an equal footing? Viewed in this light, the compensating tax is in reality a preference of the local merchant at the expense of his interstate competitor.

We conclude our examination of the true nature of the compensating tax by suggesting the following test.

If we lay the compensating tax side by side with the State's sales tax, we shall see that they are "identical twins," born of one germ cell.

Each applies only to tangible personalty sold subsequent to the date of the Act.

Each is measured by the price paid for the goods by the buyer.

Each uses the same percentage of the price to compute the tax.

If applied to interstate goods, the lien of each would attach at the same time. If the questioned tax had been enacted as a sales tax, it could not be levied or collected until the interstate personalty reached the State and was delivered to the buyer. Under the rule of the Tax Commission, that is also the exact moment when the compensating tax becomes payable. (Rule of Tax Com., Appendix, this Brief.)

In short, every characteristic of the sales tax is exactly duplicated in the compensating tax, so that the tax commission is more than justified when it declares in its rule that "taken together, (they) provide a uniform tax."

If it be true that there is no difference whatever between the two taxes save only in the names given them by the statute, then it must follow that the compensating tax *is* a sales tax, and this Court is required to consider and deal with it as such.

II.

The Questioned Tax Amounts to a Regulation of Interstate Commerce

1. The power of Congress to regulate commerce between the states is exclusive and plenary, and is not subject to any state restrictions, burdens or limitations.

Gibbons v. Ogden, 9 Wheat., 1, 193;
Bd. of Trustees of Univ. of Ill. v. U. S., 289 U. S., 48, 57.

2. Interstate commerce is not confined to transportation from one state to another, but comprehends all

commercial intercourse between different states and all the component parts of that intercourse.

Dahnke-Walker M. Co. v. Bondurant, 257 U. S., 282, 290;
Lemke v. Farmers Grain Co., 258 U. S., 50;
Shafer v. Farmers Grain Co., 268 U. S., 189;
Foster Packing Co. v. Haydel, 278 U. S., 1, 10.

3. The interstate commerce clause of the Federal Constitution protects such commerce, even after it has entered the state, from any burdens imposed by reason of its foreign origin.

Welten v. Missouri, 91 U. S., 275, 282;
Darnell v. Memphis, 208 U. S., 113, 125;
Baldwin v. Seelig, 294 U. S., 511, 526.

4. No state, through the exercise of the taxing or police powers, may establish an economic barrier between the states.

State Freight Tax Cases, 15 Wall., 276;
Baldwin v. Seelig, 294 U. S., 511, 527.

5. Interstate commerce cannot be taxed at all by the state, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.

Robbins v. Shelby Taxing Dist., 120 U. S., 489, 497;
State Freight Tax Cases, 15 Wall., 276;
Caldwell v. North Carolina, 187 U. S., 622, 625.

6. The attempt here to justify the questioned tax by pointing to the accompanying sales tax, levied on

domestic sales, does not justify the burden on interstate commerce.

> Bowman v. Chicago Ry. Co., 125 U. S., 465, 496;
> Minnesota v. Barber, 136 U. S., 313, 326;
> Crew-Levick Co. v. Pennsylvania, 245 U. S., 292, 297.

7. Although a statute may not be avowedly or in terms directed against the flow of interstate commerce into a state, if its necessary effect is to burden or obstruct commerce with other states, it is invalid.

> Minnesota v. Barber, 136 U. S., 313, 326;
> Foster Packing Co. v. Haydel, 278 U. S., 1, 10.

8. Of all the cases cited above, Baldwin v. Seelig, supra, bears the closest resemblance to this case, not only upon the facts but the legislative intent behind the facts. In the case at bar, the tax commission in its rule says (R. 35; See Appendix this Brief):

> "Thus these two methods of taxation (sales tax and compensating tax) stand as complements to each other in the state revenue plan, and, taken together provide *a uniform tax* * * *."

The commission had previously pointed out in an earlier portion of this same rule that the compensating tax had been levied

> "* * * by reason of the inability of the State, because of the Federal Constitution, to impose a burden upon sales made to residents of this State by competitive merchants in other states."

The tax commission thus announces the State's success in circumventing the Federal Constitution by

enacting a compensating tax on interstate sales in lieu of the forbidden sales tax that so exactly accomplishes the desired purpose that the two taxes can be "taken together" and called "a uniform tax." In so doing the State celebrates its success in accomplishing by a slight indirection what it could not have done directly.

In Baldwin v. Seelig, supra, New York enacted legislation to control the price to the producer for local milk. Being unable to extend its price-fixing policy directly to milk imported from a sister state, it had to resort to police power to halt the milk's sale, once it had "come to rest" in the state unless this minimum price had been paid. Thus, it, too, had to do by indirection what it could not do directly. This case's answer meets both devices with equal felicity.

> "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended."

9. The attempts of both legislatures to do by indirection what they could not do directly reminds us

that this Court in Fairbanks v. U. S., 181 U. S., 294, affirmed

> "the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result."

See also:

> Macallen v. Mass., 279 U. S., 620, 629;
> Western Union Telegraph Co. v. Foster, 247 U. S., 105, 114;
> Miller v. Milwaukee, 272 U. S., 713.

10. Since it is manifest that the questioned tax is occasioned by Washington's fear that its sales tax on domestic sales might stimulate interstate transactions, the following further language from Baldwin v. Seelig, supra, is made particularly applicable:

> "We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' * * * If New York, in order to promote the economic welfare of her merchants may guard them against the competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

III.

Is the Questioned Tax a Revenue Measure?

The rule of the tax commission that "The primary purpose of the Compensating Tax is to protect the merchants of Washington from discrimination * * by competitive merchants in other States" has another

important consequence. Viewing its primary purpose as protection, therefore not revenue, raises the question whether it can be justified as a revenue measure. In Board of Trustees of the University of Illinois v. United States, 289 U. S. 48, the University challenged the right of the United States to collect an import tax on scientific instruments imported by it under the Tariff Act of 1922. That Act was entitled—"An Act to provide revenue, to regulate commerce with foreign countries," etc. We quote from the opinion at p. 57:

> "Appellant argues that the Tariff Act is a revenue measure; * * * that the duty is a tax, that the Act is not one for the regulation of commerce but is an exertion of the taxing power, and that, as such, it is subject to the constitutional limitation that the Congress may not lay a tax so as to impose a direct burden upon an instrumentality of a State used in the performance of a governmental function."

But this Court held that, since the primary purpose of the Act was to regulate foreign trade rather than to raise revenue, the power to lay the tax must be referred to the commerce clause, and that the revenue resulting from the duties was but an incident to such exercise of the power.

There is, we acknowledge, a distinction between the questioned tax and the Tariff Act, in that the interpretation of the State tax is promulgated by its tax commission, and is not borne at the masthead of the act, in its title, as in the Tariff Act. But is not this a distinction without a difference? Out of its wide experience with revenue laws, this Court is no doubt

aware that a general revenue act such as this one, with its highly technical and involved provisions, comprising more than 200 sections and occupying 150 pages of the State's laws, does not assemble itself at the behest of the legislatively untrained farmers, realtors, clerks and mechanics who meet for a 60 day legislative session every two years, but in its principal outlines at least is the work of the tax experts and lawyers who comprise the staff of the State's tax commission. With especial assurance may we rely on this as the fact when we are confronted with such a legal innovation as this compensating tax, disclosing so plainly the shaping hand of the tax expert who comprehensively plans for all contingencies.

It is this authorship, evidently, that provides for the sweeping rule and regulation-making power of the commission that we find in this Act. And we infer that it is the experience of this Court with tax laws that has induced the Court, in Fawcuss Mach. Co. v. U. S., 282 U. S. 375, 378 and other recent decisions, to give especial weight to the interpretation of tax laws by those charged with their administration.

We are, then, confronted with an authoritative and official interpretation of the tax by the group who best understand it. It being avowed by the defendants that the primary purpose of the compensating tax is to protect Washington merchants, the questioned tax cannot be sustained under the taxing power of the State, but must seek its justification in whatever power the State has to regulate interstate commerce. Having none, the tax must fail.

IV.

Principal Contentions on Behalf of the State

Both the majority opinion of the Supreme Court of Washington in Vancouver Oil Co. v. Henneford, 183 Wash., 317, and the dissenting trial judge assume that the compensating tax, when considered with the sales tax results in no discrimination against interstate commerce. With that assumption in mind, they then take the position that the tax does not apply until after the interstate shipment of goods "comes to rest within the state and is being held for use or sale."

1. No Discrimination?

The assertion that there is no discrimination in allowing the questioned tax to rest upon interstate commerce immediately on its arrival in this state, is based on an unexamined and erroneous assumption. That assumption is that unless the precise sales tax in the full amount levied by Washington has been levied in the state of origin, its merchants enjoy an advantage in interstate trade that Washington may neutralize by taxing the goods on arrival. The fact that the vendor of these goods must pay, in one form or another, his full share of taxes in his own state for the privilege of doing business, whether he pays by a sales tax or by other taxes, is not allowed to weigh. His transaction must nevertheless bear this additional burden of the Washington tax. Thus Washington, without inquiry into the facts, becomes the ex parte judge of whether that other State is levying the full equivalent of Washington taxes on its citizens and

their transactions. And because this State deems that the state of the origin of the goods is not levying such heavy taxes as we do, it claims the paramount right to tax the products of interstate shipment immediately on their arrival, so as to "compensate" its merchants and secure protection for them against what it deems to be undue competition.

The tax systems of no two states are alike. If each state is allowed thus to "offset," as the attorney general of the State puts it, the supposed advantage other states enjoy by reason of lower taxation in one bracket, without taking into account the heavier taxation of the competing states in other brackets, what is to be the end of this race to "avoid discrimination"?

The answer is manifest. It is for this Court once more to declare that no state may take its own measures to "protect" its citizens from the competition of interstate trade, whether arising through supposed inequality of taxation or for any other reason.

2. Have the Interstate Shipments "Come to Rest"?

Bearing in mind that the questioned tax is confined strictly to property sold and is in reality but a sales tax wearing the thin disguise of a use tax, we note that its author made not the slightest effort to postpone its application until the original package of the interstate shipment is broken, or until the goods are mingled with the general mass of goods in the State. Added to this, the tax commission empowered by the statute to make rules that shall "have the same force and effect as if specifically included" in the Act, by its demand on these plaintiffs (R. 34) de-

fined the tax as to be applied whenever there is any

> "exercise of any right or power over tangible personal property preparatory to actual use within the state, such as keeping, storing, withdrawing from storage, moving or installing or performing any act by which dominion or control over the property is assumed by the purchaser."

Reduced to concrete example, this plainly means that the moment the interstate carrier delivers the personalty to the consignee, that moment the use tax applies. At that moment, the consignee is "keeping" or "moving" the property, he is "performing an act by which dominion of control over the property is assumed by the purchaser."

It will not do to say that these precise words are not found in the statute. One who moves property or who performs any act by which he assumes dominion or control over it is manifestly using it. At the least, there is no inconsistency between the tax commission's construction of the statute and its terminology.

We remark also that the legislature of Washington did not indulge even in the subterfuge of New York in the legislation that gave rise to Baldwin v. Seelig, supra, by declaring that the tax should apply only when the goods involved in interstate shipment had "come to rest," or when the goods had become "a subject of regulation by the State." It was too eager to affect interstate shipments by its tax to wait for a moment after the consignee had laid his hands on the interstate shipment.

The State takes it for granted that this Court will assume that the questioned tax is necessary to avoid discrimination. Then it is expected to assume, in the teeth of the wording of the statute and the construction placed on it by the tax commission, that the goods do come to rest in Washington, do become mingled with the mass of property in the State before the tax applies. And, finally, the appeal is made to this Court to assume, by doing equal violence to the letter and spirit of the Act, that the tax itself is merely a part of the property taxation of the state, instead of being a part of its sales tax legislation, designed to burden interstate sales of goods.

V.

Sundry Contentions of Defendants' Counsel

1. Is the questioned tax a property tax?

Counsel, at pp. 12-14 of their brief, urge this Court to disregard the holding of the Supreme Court of Washington in Vancouver Oil Co. v. Henneford, 183 Wash., 317, that this tax is an excise tax, which would also require the Court to ignore the legislative declaration that it is "a tax or excise for the privilege of using" tangible personalty. (Sec. 31, Dfts.' Br., p. 38.) In so urging, particularly in quoting from Eastern Air Transport Inc. v. So. Car. Tax Comm., 52 F. (2d), 457, counsel apparently further contend that this use tax is to be considered by the Court as a property tax.

Such a position is untenable under Billings v. U. S.,

232 U. S., 261, 279, where this Court, in analyzing the nature of a typical use tax, said:

> "It is certain that the tax levied by the provision was intended to be an excise tax upon 'the use of every foreign-built yacht, pleasure boat or vessel * * *.'"

And again, in Bromley v. McCaughn, 280 U. S., 124, 136, where this Court said:

> "* * * this Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property * * * is an excise * * *." (Citing many authorities.)

2. Is the questioned tax a "lieu" tax?

Counsel, at p. 15 of their brief, contend that the "compensating tax may be viewed as a property tax" because, as they aver, it was imposed in part in lieu of general property taxes. This Court will readily recall that the cases relied on by counsel, such as Pullman Co. v. Richardson, 261 U. S., 330, go no farther than to hold valid a tax explicitly declared to be a property tax but measured by gross receipts of a carrier, although the gross receipts included returns from interstate as well as local business. The Court noted that its validity as a property tax was further supported by the statutory declaration that the particular tax was levied in lieu of all other property taxes on such carrier.

We might well grant that the general property 40-mill tax limitation of the State curtailed the State's revenues, and that the sales and compensating taxes

were later levied, in part, to supply this newly felt need. But this mere historical connection between one legislative reduction of taxation and the later increase of taxation is so far from the narrowly restricted doctrine of "lieu" taxation that it calls for no answer other than the specific statement of the holding of these carrier cases.

3. Does the questioned tax rest also on intrastate transactions?

Counsel are concerned because the questioned tax is in reality levied only against goods that move in interstate commerce. They seek to meet that reality by denying its absolute and literal truth. At page 22 of their brief, counsel say that the use tax might apply within the State

> "to casual and isolated sales and sales of bread, fresh fruit and vegetables and dairy products consumed off the premises."

Nonsense! It is too plain for argument that the legislature did not intend to contradict its exemption of basic foods from the sales tax by levying a "use" tax. Counsel themselves avow at page 8 of their brief that the sales tax and the compensating tax are complementary and thus to be construed in harmony with each other. To picture the tax collector who is forbidden to collect a sales tax, in the act of trying to catch the consumer of an apple, or a pint of milk, or a loaf of bread, between the time of purchasing and the time of eating in order to collect a 2% "use" tax is too absurd. This is a mere quibble, and as a quibble we dismiss it.

4. If the Governor of Washington had vetoed the sales tax then what?

In the dissenting opinion in the trial court, the exclusively interstate character of the tax is sought to be minimized by the suggestion that the use tax *might* have been extended to domestic personalty, had the governor of the State vetoed the sales tax while letting the use tax stand. And this argument is reiterated by counsel in their brief. (pp. 22-3.) It should be sufficient to answer that such possibility is all but incredible, when we consider the grave distortion of legislative will that must have resulted from so capricious an action. Furthermore, the governor did nothing of the sort, and it is now too late to gain any assistance from a discussion of the predicament either of the State or the taxpayer in such an event.

But a more conclusive answer is found in Dahnke-Walker Co. v. Bondurant, 257 U. S., at p. 292, where a more probable hypothesis was advanced.

> "The state court also attached some importance to the fact that after the grain was delivered on the cars the plaintiff might have changed its mind and have sold the grain at the place of delivery or have shipped it to another point in Kentucky. No doubt this was possible, but it was also improbable. * * * The essential character of the transaction as otherwise fixed is not changed by a mere possibility of that sort."

Or, as Mr. Justice Holmes remarked in United Fuel Gas Co. v. Hallinan, 257 U. S., at page 281:

> "* * * theoretical possibilities may be left out of account."

5. Can Baldwin v. Seelig be distinguished?

At page 25 of their brief, counsel for defendants repeat the error of the majority of the Supreme Court of Washington in seeking to distinguish Baldwin v. Seelig, supra, by declaring that "There, the milk had not come to rest within the state at the time of the bottling * * *."

We need hardly remind the Court that such a statement flies in the face of the New York statute which declared that the act was to be deemed to apply whenever the

> "milk produced outside of the State becomes a subject of regulation by the State, in the exercise of its police powers * * *. After any such milk so produced shall have *come to rest* within the State * * *," etc.

It was no doubt this cunning attempt to delay the regulation until the milk should have, technically speaking, "come to rest" that caused this Court to quote approvingly from Sonneborn v. Cureton, 262 U. S., at page 516, the following:

> "'A state tax upon merchandise brought in from another State, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State.'"

Emphasizing this thought still further this Court continued:

> "Neither the power to tax nor the police power may be used by the state of destination, with the

aim and effect of establishing an economic barrier against competition * * *."

6. Is the Act's offset of sales taxes paid in sister-states useless?

At page 28 of their brief, counsel contend that the offset for sales taxes provided by the Act is inapplicable to goods brought into this State, because no such taxes would be paid in other states. All such purchases, counsel contends, would be interstate.

The common, every day fact, known of all men, is quite to the contrary. As a single instance, take the case of motor cars and motor trucks, of which plaintiff buys and uses a great many. Sales are frequently consummated in a sister state, and the new car or truck brought into the State, to save railway transportation charges. Another example is furnished by Eastern Air Transport v. Tax Com., 285 U. S., 147, 152, where this Court held a sales tax good, although the merchandise bought was to be used in interstate commerce, and chiefly beyond the confines of the taxing state in which a non-resident purchaser bought it. Furthermore, many sales taxes may be levied and collected on transactions in advance of the final transaction constituting interstate commerce. Thus considered, the trial judges were entirely correct in taking at their face value the words of the Act that exempted from the tax, all personalty that had "already been subjected" to a sales or use tax under the laws "of some other state of the United States."

VI.

Conclusion

In Second Employers' Liability Cases, 223 U. S., 1, 47, this Court, in defining what is a regulation of interstate commerce, has said that:

> " 'to regulate' in the sense intended is to foster, protect, control, restrain."

The latter half of this definition, to "control and restrain" interstate commerce, fits precisely the manifest purpose of this tax. The State's legislature avows it by creating it as, and calling it, a compensating tax. The State's tax commission avows it by declaring that the primary purpose of the tax is to protect the merchants of Washington. And the State's attorney general avows it by admitting that the tax is enacted as an "off-set" to "avoid discrimination." In view of this settled agreement by all branches of the State government charged with the enactment, interpretation and enforcement of the tax, we are assured that this Court will express its assent to the conclusion thus reached by declaring that as an attempt to control and restrain interstate commerce, the questioned tax is invalid.

W. G. GRAVES,
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Attorneys for Respondents.

APPENDIX

PERTINENT RULES AND REGULATIONS OF TAX COMMISSION OF WASHINGTON RESPECTING COMPENSATING TAX. (R. 34-5.)

Under the authority of Section 208 of Chapter 180, Session Laws of Washington 1935, the defendants, acting as the Tax Commission of the state of Washington, have on October 16, 1935, issued sundry rules and regulations relating to various taxes provided by the act and their collection. Respecting Title IV such rules and regulations (fol. 42) provide among other things as follows:

> "Statement of the Nature of the Tax.—The Compensating Tax (Title IV) was enacted to supplement the Retail Sales Tax by imposing a like tax for privilege of using within this state tangible personal property purchased at retail subsequent to April 30, 1935 (the effective date of the Retail Sales Tax law) and in respect to which property neither a sales tax nor a use tax equal to 2% has been imposed by this or any other state.
>
> "The primary purpose of the Compensating Tax is to protect the merchants of Washington from discrimination arising by reason of the inability of the state, because of the Federal Constitution, to impose a tax upon sales made to residents of this state by competitive merchants in other states.
>
> "In general, the Compensating Tax applies upon the use of any property, the sale of which would have been subject to the Washington sales tax had it been purchased within the state. Conversely, it does not apply upon the use of any property, the sale of which has been subjected to the Washington sales tax. Thus, these two

methods of taxation stand as complements to each other in the state revenue plan, and taken together, provide a uniform tax upon either the sale or use of all tangible personal property, irrespective of where it may have been purchased."

DEMAND OF TAX COMMISSION MADE UPON APPELLEES. (R. 33-4.)

"Mason-Walsh-Atkinson-Kier Company,
Mason City,
Washington.
Gentlemen:

We have been advised that during the months of May and June, 1935, the Mason-Walsh-Atkinson-Kier Company purchased at retail and used within the State of Washington various and sundry articles of tangible personal property, the sale or use of which had not theretofore been subjected to the payment of any tax by the state of Washington or by any other state, the total purchase price of which amounted to $899,390.91, exclusive of transportation costs. We have also been advised that transportation costs in connection with said purchases for said two months period amounted to $21,798.43.

We hereby make formal demand that you pay to the tax commission of the state of Washington on or before May 1, 1936, the sum of $18,423.78, the same being compensating tax at the rate of 2% due and payable to the state upon the amounts above set forth under the provision of Title IV, Chapter 180, Laws of 1935.

Demand is also hereby made upon you for payment on or before May 1, 1936, of a like tax upon all articles or tangible personal property purchased at retail between the dates July 1, 1935, and February 29, 1936, inclusive, and used by you in the state of Washington, the sale or use of which had not, prior to your purchase thereof, been subjected to a tax by this or any other state equal to 2% of the purchase price thereof.

You are advised that tax liability under Title IV, chapter 180, Laws of 1935, arises at the time tangible personal property is put to use within the state of Washington. Such property is put to use by the first act after delivery is completed within the state by which the article purchased is actually used or is made available for use with intent actually to use the same within the state. The term 'made available for use' means and includes the exercise of any right or power over tangible personal property preparatory to actual use within the state, such as keeping, storing, withdrawing from storage, moving, installing or performing any act by which dominion or control over the property is assumed by the purchaser.

In the event that the foregoing demand is not complied with on or before the date specified, we shall be compelled to take the proper steps for the recovery of the full amount of taxes due.

Very truly yours,

TAX COMMISSION OF THE STATE WASHINGTON,

EWA:K By T. M. JENNER, Commissioner."

SUPREME COURT OF THE UNITED STATES.

No. 418.—October Term, 1936.

Harold H. Henneford, et al., Appellants, *vs.* Silas Mason Company, Inc., et al., Appellees. } Appeal from the District Court of the United States for the Eastern District of Washington.

[March 29, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

A statute of Washington taxing the use of chattels in that state is assailed in this suit as a violation of the commerce clause (Constitution of the United States, Article I, § 8) in so far as the tax is applicable to chattels purchased in another state and used in Washington thereafter.

Plaintiffs (appellees in this court) are engaged either as contractors or as subcontractors in the construction of the Grand Coulee Dam on the Columbia River. In the performance of that work they have brought into the state of Washington machinery, materials and supplies, such as locomotives, cars, conveyors, pumps, and trestle steel, which were bought at retail in other states. The cost of all the articles with transportation expenses added was $921,189.34. Defendants, the Tax Commission of Washington (appellants in this court) gave notice that plaintiffs had become subject through the use of this property to a tax of $18,423.78, two per cent of the cost, and made demand for payment. A District Court of three judges, organized in accordance with § 266 of the Judicial Code (28 U. S. C. § 380), adjudged the statute void upon its face, and granted an interlocutory injunction, one judge dissenting. 15 F. Supp. 958. The case is here upon appeal. 28 U. S. C. § 380.

Chapter 180 of the Laws of Washington for the year 1935, consisting of twenty titles, lays a multitude of excise taxes on occupations and activities. Only two of these taxes are important for the purposes of the case at hand, the "tax on retail sales", imposed by Title III, and the "compensating tax", imposed by Title IV

on the privilege of use. Title III provides that after May 1, 1935, every retail sale in Washington, with a few enumerated exceptions,[1] shall be subject to a tax of 2% of the selling price. Title IV, with the heading "compensating tax", provides (§§ 31, 35) that there shall be collected from every person in the state "a tax or excise for the privilege of using within this state any article of tangible personal property purchased subsequent to April 30, 1935", at the rate of 2% of the purchase price, including in such price the cost of transportation from the place where the article was purchased. If those provisions stood alone, they would mean that retail buyers within the state would have to pay a double tax, 2% upon the sale and 2% upon the use. Relief from such a burden is provided in another section (§ 32) which qualifies the use tax by allowing four exceptions. Only two of these exceptions (b and c) call for mention at this time.[2] Subdivision (b) provides that the use tax shall not be laid unless the property has been bought at retail. Subdivision (c) provides that the tax shall not apply to the "use of any article of tangible personal property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title whether under the laws of this state or of some other state of the United States." If the rate of such other tax is less than 2%, the exemption is not to be complete (§ 33),

[1] "Sec. 19. The tax hereby levied shall not apply to the following sales:
"(a) Casual and isolated sales by a person who is not engaged in the business of selling tangible personal property at retail;
"(b) Sales made by persons in the course of business activities with respect to which tax liability is specifically imposed under title V of this act, when the gross proceeds from such sales must be included in the measure of the tax imposed under said title V;
"(c) The distribution and news stand sale of newspapers;
"(d) Sales which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;
"(e) Sales of motor vehicle fuel taxable under chapter 58 of the Laws of 1933, section 5 (being Rem. Rev. Stat., section 8327-5);
"(f) Sales made on relief vouchers issued by the department of public welfare or by any county or city or other welfare agency;
"(g) Sales of fresh sweet milk, raw unprocessed fruits and vegetables, butter, eggs, cheese, canned milk and unsweetened bread in loaf form (including rolls and buns), sold for consumption off the premises."

[2] For greater certainty exceptions (a) and (d) are stated in this note:
"The provisions of this title shall not apply:
"(a) In respect to the use of any article of tangible personal property brought into the State of Washington by a non-resident thereof for his or her use or enjoyment while within the state;
"(d) In respect to the use of tangible personal property purchased during any calendar month, the total purchase price of which is less than twenty ($20.00) dollars."

but in such circumstances the rate is to be measured by the difference.

The plan embodied in these provisions is neither hidden nor uncertain. A use tax is never payable where the user has acquired property by retail purchase in the state of Washington, except in the rare instances in which retail purchases in Washington are not subjected to a sales tax. On the other hand, a use tax is always payable where the user has acquired property by retail purchase in or from another state, unless he has paid a sales or use tax elsewhere before bringing it to Washington. The tax presupposes everywhere a retail purchase by the user before the time of use. If he has manufactured the chattel for himself, or has received it from the manufacturer as a legacy or gift, he is exempt from the use tax, whether title was acquired in Washington or elsewhere. The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?

1. The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 175; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, 453; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 575; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 519; *Woodruff* v. *Parham*, 8 Wall. 123, 137. This is so, indeed, though they are still in the original packages. *Sonneborn Bros.* v. *Curston*, 262 U. S. 506; *American Steel & Wire Co.* v. *Speed, supra; Woodruff* v. *Parham, supra.* For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or

enjoyment. *Nashville C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 267; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249, 252; *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93. The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. *Nashville C. & St. L. Ry. Co.* v. *Wallace, supra; Bromley* v. *McCaughn*, 280 U. S. 124, 136-138; *Burnet* v. *Wells*, 289 U. S. 670, 678. A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. *Ibid.* Calling the tax an excise when it is laid solely upon the use (*Vancouver Oil Co.* v. *Henneford*, 183 Wash. 317) does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership. "A nondiscriminatory tax upon local sales . . . has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected." *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission*, 285 U. S. 147, 153. A tax upon the privilege of use or storage when the chattel [illegible] or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate. *Nashville C. & St. L. Ry. Co.* v. *Wallace, supra; Edelman* v. *Boeing Air Transport, Inc., supra; Monamotor Oil Co.* v. *Johnson, supra.* Cf. *Vancouver Oil Co.* v. *Henneford, supra.*

The case before us does not call for approval or disapproval of the definition of use or enjoyment in the rules of the Commission. Those rules inform us that "property is put to use by the first act after delivery is completed within the state by which the article purchased is actually used or is made available for use with intent actually to use the same within the state. The term 'made available for use' means and includes the exercise of any right or power over tangible personal property preparatory to actual use within the state, such as keeping, storing, withdrawing from storage, moving, installing or performing any act by which dominion or control over the property is assumed by the purchaser." A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself. If the rules are too drastic in that respect or others, the defect is unimportant in relation to

this case. Here the machinery and other chattels subjected to the tax have had continuous use in Washington long after the time when delivery was over. The plaintiffs are not the champions of any rights except their own.

2. The tax upon the use after the property is at rest is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them.

Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there. No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.

When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local. "There is no demand in . . . [the] Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power." *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 480. If the sales tax were abolished, the buyer in Washington would pay at once upon the use. He would have no longer an offsetting credit. While the sales tax is in force, he pays upon the sale, and pays at the same rate. For the owner who uses after buying from afar the effect is all one whether his competitor is taxable under one title or another. This common sense conclusion

has ample precedent behind it. Alabama laid a tax on the sale of spirituous liquors, the products of sister states. Comparing the tax with others applicable to domestic products, the court upheld the statute. The methods of collection were different, but the taxes were complementary and were intended to effect equality. *Hinson* v. *Lott*, 8 Wall. 148. Louisiana laid a tax in lieu of local taxes on rolling stock operated within the state, but belonging to corporations domiciled elsewhere. The court compared the tax with the local taxes upon residents, and found discrimination lacking. *General American Tank Car Corp.* v. *Day*, 270 U. S. 367, 372, 373. South Carolina laid a tax on the storage of gasoline brought from other states and held for use in local business. The statute was interpreted by the state court as covering "all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes." Upon comparison of all the statutes, the impost was upheld. The taxpayers had "failed to show that whatever distinction there existed in form, there was any substantial discrimination in fact." *Gregg Dyeing Co.* v. *Query, supra.*

Baldwin v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, is invoked by appellees as decisive of the controversy, but the case is far apart from this one. There a statute of New York had made provision for a minimum price to be paid by dealers in milk to producers in that state. Cf. *Nebbia* v. *New York*, 291 U. S. 502; *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163. The same statute provided that when milk from another state had been brought into New York, the dealer should be prohibited from selling it at any price unless in buying the milk from the out-of-state producer he had paid the price that would be necessary if he had bought within the state. New York was attempting to project its legislation within the borders of another state by regulating the price to be paid in that state for milk acquired there. She said in effect to farmers in Vermont: your milk cannot be sold by dealers to whom you ship it in New York unless you sell it to them in Vermont at a price determined here. What Washington is saying to sellers beyond her borders is something very different. In substance what she says is this: You may ship your goods in such amounts and at such prices as you please, but the goods when used in Washington after the transit is completed, will share an equal burden with goods that have been purchased here.

We are told that a tax upon the use, even though not unlawful by force of its effects alone, is vitiated by the motives that led to its adoption. These motives cause it to be stigmatized as equivalent to a protective tariff. But motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful. *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44; *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 100, 101. Least of all will they be permitted to accomplish that result when equality and not preference is the end to be achieved. Catch words and labels, such as the words "protective tariff", are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard. A tariff, whether protective or for revenue, burdens the very act of importation, and if laid by a state upon its commerce with another is equally unlawful whether protection or revenue is the motive back of it. But a tax upon use, or, what is equivalent for present purposes, a tax upon property after importation is over, is not a clog upon the process of importation at all, any more than a tax upon the income or profits of a business. The contention would be futile that Washington in laying an ownership tax would be doing a wrong to non-residents in allowing a credit for a sales tax already borne by the owner as a result of the same ownership. To contend this would be to deny that a state may develop its scheme of taxation in such a way as to rid its exactions of unnecessary oppression. In the statute in dispute such a scheme has been developed with sedulous regard for every interest affected. Yet a word of caution should be added here to avoid the chance of misconception. We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination. This statute by its framework avoids that possibility. The offsetting allowance has been conceded, whether the concession was necessary or not, and thus the system has been divested of any semblance of inequality or prejudice. A taxing

act is not invalid because its exemptions are more generous than the state would have been free to make them by exerting the full measure of her power.

Finally, there is argument that the tax now in question, though in form upon the use, was in fact upon the foreign sale, and not upon the use at all, the form being a subterfuge. The supposed basis for that argument is a reading of the statute whereby the use shall not be taxable if the chattel was manufactured by the user or received as a legacy or acquired in any way except through the medium of purchase, and a retail one at that. But the fact that the legislature has chosen to lay a tax upon the use of chattels that have been bought does not make the tax upon the use a tax upon the sale. One could argue with as much reason that there would be a tax upon the sale if a property tax were limited to chattels so acquired. A legislature has a wide range of choice in classifying and limiting the subjects of taxation. *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 159. The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 158, 159. True, collections might be larger if the use were not dependent upon a prior purchase by the user. On the other hand, economy in administration or a fairer distribution of social benefits and burdens may have been promoted when the lines were drawn as they were. Such questions of fiscal policy will not be answered by a court. The legislature might make the tax base as broad or as narrow as it pleased.

The interlocutory injunction was erroneously granted, and the decree must be

Reversed.

Mr. Justice McReynolds and Mr. Justice Butler dissent.

A true copy.

Test:

Clerk, Supreme Court, U. S.